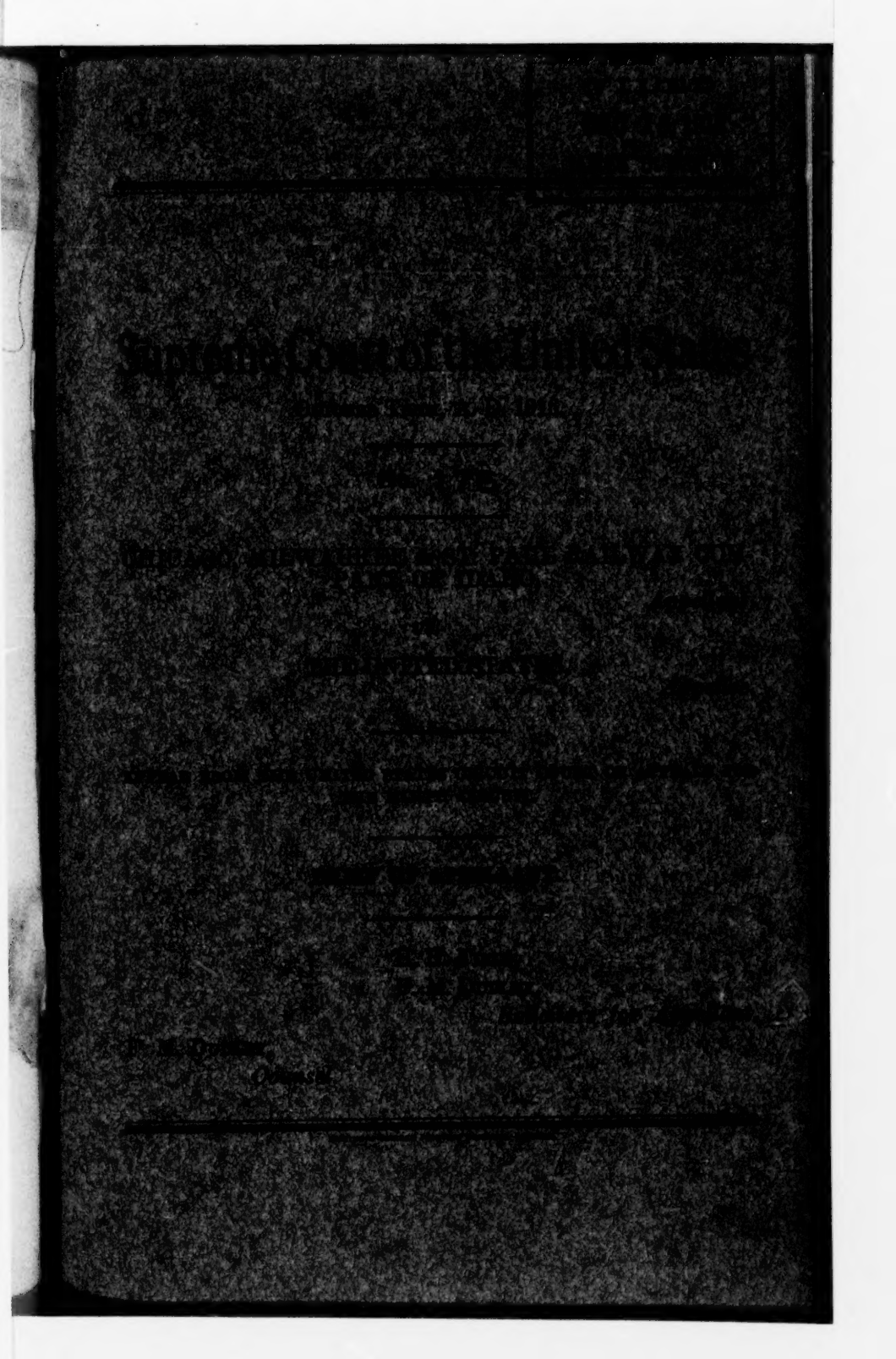

SUBJECT INDEX.

STATUTES.

STATE AND RAILROAD LAND AND RIGHT OF WAY GRANTING ACTS CITED.

LIST OF CASES CITED.

Supreme Court of the United States

OCTOBER TERM, A. D. 1916.

No. 176

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY OF IDAHO,

Appellant,

vs.

THE UNITED STATES,

Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF APPELLANT.

STATEMENT OF FACTS.

This is an appeal from a decree affirming a decree of the United States District Court commanding the appellant to execute and deliver a stipulation, which is set forth in the decree of the trial court; and adjudicating that the appellee have and recover from the appellant $68,489 as damages. The facts upon which the legal rights of the parties are dependent, are largely, although not entirely, stipulated and are as follows:

March 21, 1905, the Commissioner of the General Land Office, acting under the directions of the Secretary of the Interior, notified the district land officers at Coeur d'Alene, Idaho, that he *"temporarily"* withdrew from all disposal, except under the mineral laws, all the vacant unappropriated public lands in certain designated town-

ships in that district. (Rec., 183-4.) The lands thus withdrawn included those involved in this action. While the notice transmitted to the district land officers did not state the purpose of the withdrawal, it was in fact in anticipation of the creation of a Forest Reserve. (Bill, Rec., 6; Plaintiff's Exhibit 1, Rec., 247-8.)

In January, 1906, appellant was duly incorporated under the laws of Idaho for the purpose of constructing a railway "to be run from some convenient point to be located on the east boundary line of the State of Idaho between the 46th and 47th degrees of north latitude (See stipulation correcting an error, Supplemental Rec., ...); thence extending in a general westerly direction to some convenient point to be located on the west boundary of the State of Idaho." (Rec., 184-6.)

February 17, 1906, a certified copy of the articles of incorporation and due proof of the organization of appellant company thereunder, were accepted by the Secretary of the Interior for filing and were, pursuant to the direction of the Secretary, filed in the office of the Commissioner of the General Land Office, under the provisions of the Act of Congress approved March 3rd, 1875 (18 Stat. 482). (Rec., 187-8.)

October 13, 1906, the articles of incorporation were amended so as to specify more definitely the route of the proposed road, the amendment being:

> "The railroad so to be constructed and operated is intended to be run from a point upon the boundary line between the states of Idaho and Montana near mile post number one hundred and forty-one (141) of the survey of said boundary line; thence extending in a westerly direction through Shoshone and Kootenai Counties and the Coeur d'Alene Indian Reservation, to some convenient point to be located on the west boundary line of the State of Idaho, within the limits of said reservation." (Rec., 188-9.)

October 25, 1906, a certified copy of the amendment

was sent to the Commissioner of the General Land Office "to be filed * * * under the provisions, and in order to obtain the benefits of the right of way Act of March 3, 1875." It was received by the Commissioner and, November 16, 1906, was sent by that official to the Secretary of the Interior who, on the same date, accepted the amendment for filing and caused it to be filed in the Commissioner's office. (Rec., 189-90.)

Between June 3rd and October 13th, 1906, appellant caused the line of its proposed railroad to be surveyed, staked out and located on the ground; and October 20th, 1906, the line so located was adopted by the Board of Directors. (Rec., 191.)

Maps of the line so located and adopted, conforming to the requirements of the departmental regulations under the Act of March 3, 1875, were prepared and duly filed in the District Land Office of Coeur d'Alene October 23rd, 1906, and were, immediately after their filing, forwarded by the District Land Office to the office of the Commissioner of the General Land Office. (Rec., 195-6.)

November 6, 1906, nearly two weeks after the filing of the amendment to the articles of incorporation and two weeks after the maps of definite location had been filed in the District Land Office and forwarded by the District Land Officers to the office of the Commissioner of the General Land Office, the President issued his proclamation creating the Coeur d'Alene Forest Reserve, under the provisions of Section 24 of the Act approved March 3, 1891. By its terms this proclamation excluded from the lands thus reserved the following:

> "This proclamation will not take effect upon any lands withdrawn or reserved, at this date, from settlement, entry, or other appropriation, for any purpose other than forest uses, or which may be covered by any prior valid claim, so long as the withdrawal, reservation, or claim exists." (Rec., 196-7.)

March 18, 1907, appellant, as the result of additional

surveys, by resolution adopted a route differing in some particulars from that shown on the maps filed October 23, 1906; and March 20th, 1907, maps showing the newly adopted location, were filed in the Coeur d'Alene District Land Office, which maps were immediately after filing forwarded by the district officials to the office of the Commissioner of the General Land Office. (Rec., 198-9.)

As the result of still further surveys, a third route, differing slightly from those shown on each of the former maps, was, on May 6, 1907, adopted by resolution of appellant's directors. Maps showing this line were, May 10, 1907, filed in the District Land Office at Coeur d'Alene; and, after filing, were transmitted by the District Land officers to the office of the Commissioner of the General Land Office. (Rec., 202-3.)

The maps filed October 23, 1906, and the maps of amended route filed March 20th and May 10th, 1907, were severally accompanied with proper field notes and conformed in all respects to the regulations for the preparation of maps for filing under the Act of March 3, 1875. Each map contained proper certificates by the president and chief engineer of appellant, that by the president reciting that it had "been prepared to be filed in order to obtain the benefits of the Act of Congress approved March 3, 1875, entitled," etc. (Rec., 195, 202, 206.)

The routes shown upon the three maps began and ended at common points. The location of each is shown upon Exhibit X accompanying the stipulation (Suppl. Rec., ...); and it will be noted that the changes made by the successive amendments did not lengthen the route or affect the interests of the United States otherwise than beneficially.

The maps filed October 23, 1906, had not been approved by the Secretary of the Interior when they were superseded by the maps of March 20th, 1907; nor had these

been approved by that official when they in turn were superseded by those of May 10, 1907. And June 25, 1907, the maps and field notes which had been filed October 23, 1906, and March 20, 1907, respectively, were returned to the appellant because, as stated in the letter returning such documents, apparently superseded by those filed May 10, 1907. (Rec., 207-9.)

May 11, 1904, the Secretary of the Interior had promulgated certain regulations governing the procedure to be followed to secure a right of way through forest reserves under the Act of March 3, 1875, and the provisions of the Act of March 3, 1899. (30 Stat. 1233.) These regulations provided, among other things, as follows:

> "2. Whenever a right of way is located upon a forest or timber land reserve the applicant must file a stipulation under seal incorporating the following:
>
> (1) That the proposed right of way is not so located as to interfere with the proper occupation of the reservation by the Government.
>
> (2) That the applicant will cut no timber from the reserve outside the right of way.
>
> (3) That the applicant will remove no timber within the right of way, except only such as is rendered necessary by the proper use and enjoyment of the privilege for which application is made, and that he will also remove from the reservation, or destroy, under proper safeguards, as determined by this office, all standing, fallen, and dead timber, as well as all tops, lops, brush, and refuse cuttings on the right of way, for such distance on each side of the central line as may be determined by the General Land Office to be essential to protect the forest from fire to the fullest extent possible.
>
> (4) That the applicant will furnish free of charge such assistance in men and material for fighting fires as may be spared without serious injury to the applicant's business. (Acting Secretary, September 2, 1902.)
>
> The applicant will also be required to give bond to the Government of the United States, to be approved by the Commissioner of the General Land Office, such

bond stipulating that the makers thereof will pay to the United States 'for any and all damage to the public lands, timber, natural curiosities, or other public property on such reservation, or upon the lands of the United States, by reason of such use and occupation of the reserve, regardless of the cause or circumstances under which such damage may occur.' A bond furnished by any surety company that has complied with the provisions of the Act of August 13, 1894 (28 Stat. 279), will be accepted, and must run in the terms of the stipulation above quoted. The amount of the bond cannot be fixed until the application has been submitted to the General Land Office, when a form of bond will be furnished and the amount thereof fixed.

No construction can be allowed on a reservation until an application for right of way has been regularly filed in accordance with the laws of the United States and has been approved by the Department, or has been considered by this office or the Department, and permission for such construction has been specifically given. * * *

16. Maps or plats of lines of route or station grounds lying wholly on unsurveyed lands may be received and placed on file in the General Land Office and the local land office of the district in which the same is situated, for general information, and the date of filing will be noted thereon; but the same will not be submitted to nor approved by the Secretary of the Interior, as the act makes no provision for the approval of any but maps showing the location in connection with the public surveys. The filing of such maps or plats will not dispense with the filing of maps or plats after the survey of the lands and within the time limited in the act granting the right of way, which map or plat, if in all respects regular when filed, will receive the Secretary's approval." (Rec., 177-182.)

April 26, 1906, the following additional regulation was promulgated:

"In accordance with the agreement made by and between the Department of the Interior and the Department of Agriculture, paragraph 2 of the circular of February 11, 1904 (32 L. D. 481), and paragraphs

3 and 68 of the circular of September 28, 1905 (34 L. D. 212), except the last clause in each relative to construction in advance of approval or specific permission, which will remain as at present, are hereby amended so as to read as follows:

'Whenever a right of way is located upon a forest or timber land reserve, the applicant must enter into such stipulation and execute such bond as the Secretary of Agriculture may require for the protection of such reserve.'

This amendment applies to forest or timber land reserves only, not to national parks." (Rec., 183.)

In January, 1907, the chief law officer of the Forest Service wrote the Washington attorneys for appellant advising that the maps of location had been, after the creation of the reserve, referred to the Forester for report, and that "he will be obliged to require a stipulation for the Coeur d'Alene similar to that now being negotiated for the Helena Forest Reserve." (Rec., 209-10.)

May 10, 1907, Mr. George R. Peck signed and filed with the United States Department of Agriculture, Forest Service, the following writing:

"Whereas, the Chicago, Milwaukee & St. Paul Railway Company of Idaho desires immediate permission from the Forest Service to begin construction of the Company's railroad in the Coeur d'Alene National Forest, Idaho, I hereby promise and agree on behalf of the company that it will execute and abide by stipulation and conditions to be prescribed by the Forester in respect to said railroad; such stipulation and conditions to be as nearly as practicable like those executed by the company on January 18, 1907, in respect to its railroad within the Helena National Forest, Montana."

This was signed "Geo. R. Peck, General Counsel for the Chicago, Milwaukee & St. Paul Railway Company of Idaho." (Rec., 210-11.)

This paper is the principal, if not sole, basis of the appellee's claim of right to resort to a court of equity, as distinguished from a court of law, the contention being

that the promise therein made to execute and abide by a stipulation as nearly as practicable like the one executed with respect to the railway in the Helena National Forest, is one which the court will specifically enforce. Although this paper was signed by Mr. Peck as "General Counsel" for appellant, he was in fact not an officer of appellant company. (Rec., 379.) He was the General Counsel of the Chicago, Milwaukee & St. Paul Railway Company, the parent company, and had conducted negotiations with officers of the Interior and Agricultural Departments of the Government for rights of way over public lands sought by the subsidiary corporations, the Chicago, Milwaukee & St. Paul Railway Company of Montana, the Chicago, Milwaukee & St. Paul Railway Company of Washington, and appellant. (Rec., 369, 371.) With reference to the designation of himself as "General Counsel" of appellant in this writing, Mr. Peck testifies that he did not write this, and did not notice it at the time he executed the document. (Rec., 371.)

It is clearly established as a fact that Mr. Peck executed and delivered this document under a misapprehension of the facts. The Chicago, Milwaukee & St. Paul Railway Company of Montana had, some four months *after* the creation, by proclamation, of the Helena National Forest Reserve, complied with the provisions of the Act of March 3, 1875, granting rights of way through the public lands; and having made application for a right of way through the Helena National Forest, it was required to, and did, for the purpose of securing the approval of its maps of location through that Reserve, execute and file the stipulation attached to the complaint as Exhibit "D." (Rec., 38-42.) This was referred to in the Peck writing as the stipulation "executed by the company on January 18, 1907, in respect to its railroad within the Helena National Forest, Montana." The condi-

tions with respect to the right of way through the Helena Forest, to secure the approval of which, stipulation was signed, and those existing in the case of the Coeur d'Alene National Forest, were markedly different. In the Montana case the reserve had been created and was in existence *before* the railway company had become entitled to any rights under the Act of 1875. In the Idaho case the railway company had not only become entitled to the benefits of the Act of 1875 by the acceptance and filing of a certified copy of its articles of incorporation and proofs of its organization in the Interior Department, but it had definitely located and adopted the original line of its road and had filed proper maps thereof in the district land office, from which they had been forwarded to the General Land Office, nearly two weeks before the creation of the Coeur d'Alene National Forest. Mr. Peck testifies that he did not know of this difference in the conditions at the time he executed and delivered the writing of May 10, 1907; that he did not know at that time that the Coeur d'Alene Forest had not been created when the map was filed (Rec., 370); that he was first advised of this afterward, receiving the information from Mr. Field, General Counsel of appellant, at a time when he and Mr. Field were in Washington negotiating for the right of way through the reserve (Rec., 371-2); that the witness then informed some of the Government officials with whom such negotiations were being conducted, that he did not know at the time he executed the writing that the reserve had not been created by proclamation prior to the time appellant had filed its map of location; also that at the time he executed this paper he understood that the conditions with respect to the right of way through the Coeur d'Alene Reserve, were the same as those with respect to the right of way through the Helena Reservation; that Mr. Woodruff, one of the government

officers to whom such statements were made by the witness, and probably others, stated that if the stipulation had been signed by the witness under a misapprehension of fact, it ought not to be held against him, and that they would not so hold it, that it would not be equitable. (Rec., 372-5.)

The testimony of Mr. Peck is fully corroborated by Mr. Field, General Counsel of appellant, who fixes the time when he informed Mr. Peck that the Coeur d'Alene Reserve had not been created prior to the filing of the company's maps, as in October, 1907. (Rec., 379-380; see also pp. 380-1, 383-4.) He also testifies that this was the first time that the writing of May 10, 1907, was brought to his notice. (Rec., 380.)

This testimony is not controverted, although it was objected to as incompetent; and, assuming it to be admissible, the *fact* that Mr. Peck acted under a misapprehension of facts in executing the writing of May 10, 1907, is not questioned.

Upon the execution and delivery of this writing of May 10, 1907, there was endorsed thereon by the Acting Forester, the following notation:

> "Approved and advance permission given to construct, subject to ratification hereof by the Company.
>
> Dated May 10, 1907.
>
> (Signed) JAMES B. ADAMS,
> *Acting Forester.*"
> (Rec., 37, 75, 211.)

This stipulation never was ratified by the company; on the contrary, when, in the following October, it was brought to the notice of its officials, the company at once took the position that it had been executed under a mistake of fact and ought not to be insisted upon by the government, a position acquiesced in by at least one of the representatives of the government. (Rec., 372-5, 380-1, 383-4.)

On the day that the paper was executed by Mr. Peck, May 10th, and although there had been no ratification thereof by the company, the Chief of the Office of Lands of the Forest Service sent a telegram to the Forest Supervisor of the Coeur d'Alene Forest, saying:

> "Advance permission given to-day St. Paul Railroad Company to construct railroad through Coeur d'Alene, subject usual stipulations. Supervise clearing and piling and scale all timber cut. Letter follows." (Rec., 211-2.)

This telegram was confirmed by letter the following day. (Rec., 212.)

Between the 1st and 15th of October, 1907 (Rec., 379), Mr. Peck and Mr. Field were in Washington, conducting negotiations with officers of the government with reference to rights of way for the Washington and Idaho corporations through the forest reserves in those states, and at this time the Peck stipulation was first brought to Mr. Field's notice. This also appears to be the first notice thereof had by any officer of appellant; and, as stated, was the first time that Mr. Peck was advised as to the difference between the situation of the right of way through the Helena Reserve and that of the right of way through this reserve; and the officers were at once advised that the Peck stipulation had been signed under a mistake of fact and equitably should not be asserted by the Government. (Rec., 368-384.)

October 24, 1907, the Chief of the Office of Lands of the Forest Service transmitted to the Supervisor of the Coeur d'Alene Forest a form of stipulation with instructions to forward it to appellant for execution. The stipulation thus forwarded is that attached to the complaint as Exhibit "G"; which the bill prays that appellant be required to execute as a compliance with the Peck stipulation. (Rec., 22-3, 44-49, 219.)

This stipulation was delivered to appellant about No-

vember 15, 1907; whereupon appellant informed the Supervisor that it would not execute such stipulation, but would await the outcome of negotiations then pending with the officers of the Interior Department and of the Department of Agriculture. (Rec., 225.)

December 2, 1907, Mr. Peck, acting for appellant, personally advised the Forester at Washington that he, Peck, was not authorized to make any different agreement in respect to the right of way through the Coeur d'Alene National Forest, than that which had been made for a right of way through the Yakima National Forest; at the same time Mr. Peck requested some assurance that appellant should not be disturbed in its work of construction through the Coeur d'Alene National Forest. Pursuant to this request the following instructions were telegraphed to the Forest Supervisor of the Coeur d'Alene Forest:

> "WASHINGTON, D. C., Dec. 2, 1907.
>
> Chicago, Milwaukee & St. Paul claims right to construct without stipulation and without paying for timber destroyed. While negotiations are pending allow construction to proceed. Friendly suit probable." (Rec., 225-6.)

There was from this time, at the least, no misunderstanding by the government of the attitude of appellant with reference to signing the stipulation, Exhibit "G." Mr. Wells, Law Officer of the Forestry Service, on this day prepared a memorandum of the conflicting views and directed that copies thereof should be sent to the Chief Inspector, to the Supervisor and to Mr. Peck. (Rec., 226-9.) And whatever work was done by the appellant after this time, if not after October, the date of the interviews between the department officials and Messrs. Peck and Field, was permitted by the government with full knowledge that the railway company did not consider itself bound by the Peck stipulation, or under any obligation to pay for timber taken from the right of way or

from the extra widths which the Forestry Service desired it to clear for the protection of the forest.

August 14, 1908, the Acting Secretary of the Interior, pursuant to the request of the Department of Agriculture, notified appellant that the Secretary of the Interior would not approve the maps of location until it had satisfied the Department of Agriculture by executing the stipulation, Exhibit "G." (Rec., 229-30.)

October 10, 1908, the Secretary of the Interior again wrote the appellant notifying it "that unless the stipulation is duly executed and filed within fifteen days from the date of this letter," the maps would be rejected and stricken from the files of the Department. And October 29th, the stipulation not having been executed or filed by the railway company, the Secretary of the Interior again wrote the company, saying:

> "The stipulation has not been filed, and the time allowed therefor having expired, the application is hereby rejected, the maps and papers are stricken from the files of this Department and are herewith enclosed." (Rec., 233-4.)

The maps filed by appellant May 10, 1907, were returned to appellant with this letter. The sole reason for refusing to approve the maps was, as clearly and distinctly stated in the letters, the refusal of the railway company to execute and file the demanded stipulation, Exhibit "G." (Rec., 234.)

Appellant began the construction of that part of its road extending through the Coeur d'Alene Forest about July 10, 1907. Between that time and December 3, 1907, the date of the formal notification to the government that it did not consider itself bound by the Peck agreement or legally liable for timber cut, it expended in the construction of its railway across the reserve, approximately $523,000. The grading and track laying through the reserve were completed about December 1, 1908, at an ex-

penditure of approximately $3,873,813.62, the expenditures between the date of the formal notification to the government of the company's position, and December 1, 1908, being thus approximately $3,350,813. The road was completed about July 31, 1909, at a further cost of $926,186.38, making the total cost of the railway through the reserve approximately $4,800,000, of which $4,277,000 were expended after notice to the government of the railway company's contention that it was entitled to the benefits of the Act of 1875, and under no legal obligation to pay for timber cut. (Rec., 234-5.)

The government had full knowledge of the progress of this work, and not only did nothing to interfere therewith, but directed and required the company to cut and remove the timber from extra widths outside of the right of way, for the protection of the forest. This extra cutting was done by the company at the request of the government, and for its exclusive benefit. See,

Letter of March 9, 1908, Record, p. 235,
Letter of March 17, 1908, Record, p. 236,
Letter of April 27, 1908, Record, p. 237,
Letter of May 15, 1908, Record, p. 238,
Letter of July 10, 1908, Record, p. 239,
Letter of July 23, 1908, Record, p. 242,
Letter of July 11, 1908, Record, p. 243,
Letter of August 6, 1908, Record, p. 244,
Letter of August 13, 1908, Record, p. 245,
Testimony of Mr. Skeels, Record, pp. 254, 275-6.

The bill of complaint which was not filed until *June 25, 1909*, and after the work was practically completed, alleged the order of withdrawal made by the Commissioner of the General Land Office March 21, 1905, charging that such withdrawal was made "pending a decision of the President as to the advisability of creating a National Forest thereof"; the proclamation creating the Forest November 6, 1906; the promulgation of regulations by the Interior Department February 11, 1904, with refer-

ence to the acquisition of rights of way over forest and timber land reserves; the filing by appellant of its maps of location October 23, 1906, March 20, 1907, and May 10, 1907; that when the map of March 20, 1907, was filed, that of October 23, 1906, which had not been approved, was returned to appellant, and that when the map of May 10, 1907, was filed the one of March 20, 1907, which also had not been approved, was similarly returned; and that the map filed May 10, 1907, "has never been approved by the Secretary of the Interior *for the reason that the defendant has neglected and refused to execute and file, or execute or file, the stipulation and bond prescribed and required as hereinafter set forth.*" The bill further alleged the execution of the writing by Mr. Peck May 10, 1907, and that the Forester, in reliance thereon, gave advance permission to appellant to proceed with the work; and charged that thereafter appellant availed itself of such permission and proceeded with the construction of its railway through the reservation, prosecuting the same continuously until December 3, 1907, when, as alleged, Mr. Peck notified the Forester that appellant claimed it should not be required to file any stipulation whatever. In connection with the allegation of the giving of the writing by Mr. Peck May 10, 1907, the bill exhibits a copy of the stipulation with respect to the right of way through the Helena National Forest, the conditions and stipulations of which were, as nearly as practicable, according to the promise expressed in the Peck writing, to be embodied in the stipulation to be executed with reference to the Coeur d'Alene Forest.

The bill then charged that there was prepared by the Secretary of Agriculture a stipulation, a copy of which is attached to the bill as Exhibit "G," and which it is charged was "as nearly as practicable like the said stipulation executed by the defendant in respect to the right

of way through the Helena National Forest"; and that appellant was required by the proper officers to enter into and execute the same for the protection of the Coeur d'Alene Forest; and that October 29, 1908, upon its failure so to do within a time fixed, the map of location filed by appellant was rejected and stricken from the files by the Secretary of the Interior.

The bill further charged that at all times since the President's proclamation of November 6, 1906, creating the Forest, appellant wrongfully, illegally, and without any authority from the government, except under the terms and conditions of the Peck writing of May 10, 1907, had cut and caused to be cut on lands in the National Forest 8,996,530 feet of timber, that such timber had been cut on a 200-foot right of way and an additional strip of 100 feet width abutting on the up-hill side of the right of way; that appellant had cleared and was clearing such land for the purpose of constructing a railway, and had constructed and was constructing a railway; that it had conducted, and was so conducting, its operations as to destroy a large amount of small timber and small growth; that in its work it had thrown and rolled, and was throwing and rolling, great quantities of rock, earth, gravel and debris into the St. Joe river, thereby obstructing and rendering the same unfit for navigation and log driving until such obstructions should be removed; and that, through lack of proper precautions against fire, it had set numerous fires along its right of way, burning 4,045,700 feet of merchantable timber and 1,344½ acres of seedlings upon complainant's lands.

The bill further charged that appellant threatened and intended to continue to disregard the requirements of the Secretary of the Interior and of the Secretary of Agriculture, and without signing the demanded stipulation and without awaiting the approval of its map of loca-

tion, and without any other license, permit or authority from the government, to cut the complainant's timber on the reserved land, and commit other unauthorized acts of trespass and waste, and to continue the construction and operation of [illegible]ilway over the reserve; that unless enjoined, app[illegible]ould carry out such threats, repeat the wrongs an[illegible]uries alleged, and thereby inflict irreparable damage and injury upon complainant and the public interests; that the wrongful conduct of appellant involved, and would continue to involve, long continuing and damaging trespasses for the redress of which there existed no adequate remedy at law; that they constituted and were a public nuisance injurious to complainant and its citizens. (See Bill of Complaint, Rec., 6-34.)

Although the bill appeared thus to point to injunctive relief as the desired remedy, the prayer practically disavowed all desire for such relief except as a means to compel appellant to execute the stipulation, Exhibit "G." This extraordinary prayer is: (1) that appellant be required to execute the stipulation, Exhibit "G"; (2) that it be required to cease from obstructing the navigability of the St. Joe River; (3) that it be required to refrain from continuing the alleged wrongs and injuries, and from cutting any timber and constructing and operating its railway within the bounds of the Coeur d'Alene National Forest, *"until it shall have executed and filed with the Secretary of the Interior the said required stipulation and until it shall have complied with the laws of plaintiff and its said so-called map shall have been approved by the Secretary of the Interior"; or* that it be perpetually enjoined from continuing the alleged wrongs and injuries, and from cutting any timber and constructing or operating its railway within the bounds of the Forest; (4) that complainant be accorded its damages. (Rec., 34-36.)

The bill did not charge that appellant had ever filed a certified copy of its articles of incorporation or proofs of organization requisite to entitle it to the benefits of the Act of March 3, 1875, or had otherwise complied with the laws of the United States sufficiently to have authorized the granting to it by the officers of the Interior Department or of the Department of Agriculture, of a right of way or of the privilege of cutting timber; and although the bill was drafted upon the theory that by the approval of the maps of location, such rights would have vested in appellant, it totally failed to charge the existence of matters which were essential to the jurisdiction of the departmental officers to confer upon appellant, and to the power of appellant to receive, any rights in the Forest.

The consequences of these omissions was to leave the bill one purely and simply against trespass and waste; and to render the various allegations as to the order of withdrawal, the proclamation creating the Forest, the filing of the maps, the Peck stipulation, the demand that appellant execute a stipulation similar to the Helena Forest stipulation, and its refusal so to do, totally immaterial and impertinent to the issues.

Exceptions were filed by appellant to parts of the bill as impertinent, viz.: to allegations with respect to the commissioner's order of withdrawal; to the allegations of the eighth paragraph with reference to the Peck stipulation and the giving of advance permission to appellant by the departmental officers in reliance thereon, and various allegations in other portions of the bill referring to this Peck stipulation as a material factor; to the allegation in the ninth paragraph of the bill that the stipulation demanded of appellant was reasonable, necessary or as nearly as practicable like the Helena Forest Stipulation; to the allegation that the Secretary

of the Interior had determined that the public interests would be injuriously affected if the demanded stipulation were not executed and filed; to the allegation of rejection of appellant's map by the Secretary of the Interior; and to certain other allegations not necessary to note here. (Rec., 53-8.) These exceptions were all denied. (Rec., 58.)

Appellant also demurred to parts of the bill and to the entire bill, as follows:

(1) To the allegations with respect to depositing debris in the St. Joe River, upon the grounds (a) that complainant had no interest in such matter; (b) that as to such matter defendant was answerable only to the State of Idaho, and (c) that complainant was not entitled to relief with respect thereto.

(2 and 3) To the allegations with respect to the injuries by fire, upon the ground that as to such matters complainant had an adequate remedy at law, and there was no equity therein.

(4) To the allegation of cutting timber upon the 200-foot right of way, upon the grounds (a) that it was acting within its legal rights, and (b) that there was no equity in said matter.

(5) To the allegation of cutting timber outside of the 200-foot right of way, upon the ground that there was no equity in said matter.

(6) To the allegations that defendant had cleared and was clearing ground for the construction of a railroad and had constructed and was constructing such railroad, upon the ground that there was no equity in such matter.

(7) To the bill as an entirety, upon the ground that it was multifarious, the complainant having joined therein matters of legal with matters of equitable cognizance; also a cause of action for the obstruction of a highway,

with a claim for damages arising from negligent acts, and a cause of action for wilful waste and continuous trespass.

(8) To the bill as an entirety for that it was without equity and did not set forth matters entitling complainant to equitable relief. (Rec., 49-53.) This demurrer was overruled. (Rec., 59.)

Appellant thereupon answered. (Rec., 59-100.) As no question of the sufficiency of the answer is involved, it is unnecessary to abstract its contents. It set forth facts showing a full compliance by appellant with the right of way Act of March 3, 1875; that the Peck stipulation was signed under a misapprehension of fact, and its execution was never ratified by appellant; that the complainant with full knowledge of all facts and with knowledge that appellant had refused to execute the demanded stipulation, and claimed the legal right to construct its railway through the reserve under the provisions of the Act of March 3, 1875, had failed to take any action until the appellant had completed its work, expending thereon more than $4,000,000; that complainant was thereby estopped to demand that defendant execute the demanded stipulation; and that its demands were stale and without equity.

The evidence in the case, so far as it relates to record matters and correspondence, is embodied in a stipulation of facts. (Rec., 176-247.) Testimony was offered on behalf of the government as to the quantity and value of the timber destroyed, and by appellant as to the value thereof. Appellant offered no testimony as to the quantities, but contented itself with objections to the competency of that offered by the government—objections which it still relies upon. If these objections were and are, as we believe, well founded in law, so much of the decree as requires payment for such timber in the total

amount of $62,989 must be vacated, even if the court should be of opinion that appellant was without legal right to the right of way. The government further offered testimony as to the depositing of debris in the St. Joe River and the cost of removing the same. Appellant objected to the competency of this testimony; and standing upon such objection, offered no evidence as to this matter. If these objections are well founded, so much of the decree as requires the payment of $5,500 upon this account must be vacated, regardless of the ruling as to other matters.

The appellant offered evidence showing that the execution by Mr. Peck of the stipulation of May 10, 1907, was under a mistake of fact; and the government offered some rebuttal evidence with respect thereto.

Prior to the hearing in the trial court, specifications of objections to the admission of evidence were duly filed. (Rec., 101-136.) These objections, however, were disregarded by the trial judge who made no specific ruling thereon, although so far as they were based upon the insufficiency of the pleadings, the opinion and decree necessarily involved a ruling adverse to appellant.

ASSIGNMENTS OF ERROR.

I.

THE UNITED STATES CIRCUIT COURT OF APPEALS ERRED IN FAILING TO HOLD THAT APPELLANT IS ENTITLED TO THE RIGHT OF WAY THROUGH THE FOREST RESERVE UNDER THE ACT OF MARCH 3, 1875, AND TO TAKE MATERIAL OF EARTH, STONE AND TIMBER FROM ADJACENT LANDS FOR CONSTRUCTION PURPOSES WITHOUT PAYMENT THEREFOR.

Under this assignment we shall consider the following errors specified in the assignment of errors and prayer for reversal:

(a) The said United States Circuit Court of Appeals erred in failing to hold that the matter hereinafter set forth was immaterial, and that defendant's objection thereto should have been sustained, the said matter being that contained in the 3rd paragraph of the stipulation of facts entered into between the parties hereto, subject to all objections as to competency, materiality and relevancy, viz.:

> "That on March 21, 1905, the Commissioner of the General Land Office transmitted to the register and receiver of the United States District Land Office at Coeur d'Alene City, Idaho, the following letter which (omitting formal parts and signatures) reads as follows:
>
> 'By direction of the Secretary of the Interior, I hereby temporarily withdraw from all disposal, except under the mineral laws, all the vacant unappropriated public lands in the following described area in your district:
>
> All of townships 42 N. and 43 N., lying east of Range 2 E.
>
> All of township 44 N., lying east of Range 3 East.
>
> All of township 45 N., lying east of Range 4 East.
>
> All of townships 46 N. and 47 N., lying east of Range 2 East.
>
> All of Boise Meridian, Idaho.
>
> Note this withdrawal upon the records of your office.'
>
> That at the same time he transmitted to the Register and Receiver of the United States Land Office at Lewiston, Idaho, a similar letter but describing only lands in townships 37, 38, 39, 40, 41 and 42 north." (39th Assignment of Error, Rec., 630-31.)

(b) The Circuit Court of Appeals erred in failing to hold that the matter hereinafter set forth was immaterial, and that defendant's objection thereto should have been sustained, the said matter being the following contained in the 12th paragraph of said stipulation of facts, viz.:

> "That May 10th, 1907, George R. Peck, as General Counsel for the Chicago, Milwaukee & St. Paul

Railway Company of Idaho, filed with the United States Department of Agriculture Forest Service a paper writing as follows, to wit:

United States Department of Agriculture Forest Service.

Chicago, Milwaukee & St. Paul Railway Company of Idaho,—Railroad (Interior)—Coeur d'Alene National Forest, Idaho.

'WHEREAS, the Chicago, Milwaukee & St. Paul Railway Company of Idaho desires immediate permission from the Forest Service to begin construction of the Company's railroad in the Coeur d'Alene National Forest, Idaho, I hereby promise and agree on behalf of the Company that it will execute and abide by stipulations and conditions to be prescribed by the Forester in respect to said railroad; such stipulations and conditions to be as nearly as practicable like those executed by the Company on January 18, 1907, in respect to its railroad within the Helena National Forest, Montana. Date May 10, 1907. (Signed) Geo. R. Peck, General Counsel for the Chicago, Milwaukee & St. Paul Railway Company of Idaho.'

And thereupon the United States Acting Forester made upon said paper writing the following indorsements, to wit:

'Approved and advance permission given to construct, subject to ratification hereof by the Company.

Date: May 10, 1907.

JAMES B. ADAMS,
Acting Forester.'

That thereupon on May 10, 1907, G. F. Pollock, Chief of the Office of Lands of the Forest Service in the United States Department of Agriculture, transmitted to Richard H. Rutledge, Forest Supervisor of the Coeur d'Alene National Forest, the following telegram, to wit (formal parts and signatures omitted):

'Advance permission given today St. Paul Railroad Company to construct railroad through Coeur d'Alene, subject usual stipulations. Supervise clearing and piling and scale all timber cut. Letter follows.

POLLOCK.'

And on May 11, 1907, said Pollock transmitted to

said Rutledge the following letter, to wit (formal parts and signature omitted):

'The following telegram in this case was sent to you today:

"Advance permission given today St. Paul Railroad Company to construct railroad through Coeur d'Alene, subject usual stipulation. Supervise clearing and piling and scale all timber cut. Letter follows."

A blue-print showing the route has been sent to you under separate cover. Enclosed with this letter is a copy of the preliminary stipulation entered into today at this office with Mr. Geo. R. Peck, General Counsel for the road. There is also enclosed a copy of the stipulation executed by the Company in respect to its road through the Helena National Forest. The stipulation to be executed by the Company in this case will be as nearly as practicable like that executed in the Helena case.

Please examine carefully the enclosed copy of the Helena stipulation and at the earliest practicable date submit your report on Form 964, giving particular attention to the question of the width necessary to be cleared in order to protect the forest from fire.

By separate letters, you will be fully instructed in regard to the cutting and payment for timber, and how to prepare your part of the report affecting the timber.'"

(40th Assignment of Error, Rec., 631-634.)

(c) The said Circuit Court of Appeals erred in failing to hold that the letter of March 14, 1905, with the endorsements thereon, Defendant's Exhibit 1, was incompetent. Said exhibit, excluding the certain formal parts and signatures, is as follows:

"As a result of investigation by the Bureau of Forestry in the State of Idaho, I have the honor to recommend the immediate withdrawal of the following described lands, pending the creation of the proposed Shoshone Forest Reserve:

Township 47 north, ranges 3 to 6 east; township 45 north, ranges 5 to 9 east; township 44 north, ranges 4 to 9 east; township 42 north, ranges 3 to

9 east; township 42 north, ranges 3 to 11 east; township 41 north, ranges 4 to 11 east; township 40 north, ranges 7 to 11 east; township 39 north, ranges 7 to 14 east; township 38 north, ranges 8 to 9 east; township 37 north, ranges 7 to 9 east; Boise Principal Meridian."

The endorsement on the foregoing letter in words and figures reads as follows:

"1006.

Department of the Interior: Received Mar. 3, 1905.

L. & R. R. Div. Acting Secretary of Agr. March 14, 1905.

Recommends the withdrawal of described lands for the proposed Shoshone Forest Reserve, Idaho. J. I. P.

Department of the Interior, March 20, 1905.

U. S. General Land Office,

Received Mar. 21, 1905. 4770.

48961.

Acknowledged and respectfully referred to the Commissioner of the General Land Office with instructions to withdraw the lands herein described in accordance with the recommendation of the Acting Secretary of Agriculture, unless there is some good reason why such action should not be taken.

Advise the Department of action taken with return of this letter.

E. A. HITCHCOCK,
Secretary."

(41st Assignment of Error, Rec., 634-5.)

(d) The said Circuit Court of Appeals erred in failing to hold that the order of withdrawal made by the Commissioner of the General Land Office, March 21, 1905, was void.

(42nd Assignment of Error, Rec., 635-6.)

(e) The said Circuit Court of Appeals erred in failing to hold that the order of withdrawal made by the Commissioner of the General Land Office March 21, 1905, even if valid as to settlers, did not exclude the lands with-

drawn from the operations of the Act of March 3, 1875, granting rights of way to railway companies through the public lands of the United States.

(43rd Assignment of Error, Rec., 636.)

(f) The said Circuit Court of Appeals erred in failing to hold that the defendant had, prior to November 6, 1906, the date of the President's proclamation creating the Coeur d'Alene Forest Reserve, by its compliance with the terms and provisions of the Act of March 3, 1875, acquired the grant of a right of way 200 feet in width with the privilege of taking material of earth, stone and timber for the construction of its railway over and across the lands included in such forest reserve, which was prior in time and which precluded the extinguishment of the rights of the Railway Company by the creation of such reserve.

(44th Assignment of Error, Rec., 636.)

(g) The said Circuit Court of Appeals erred in holding that the making of amended locations of said railroad and the filing of maps thereof in the United States District Land Office rendered the grant of right of way and of the privilege of taking material of earth, stone and timber from lands adjacent to the right of way for the purpose of constructing said road, subsequent in time to the creation of said Forest Reserve.

(45th Assignment of Error, Rec., 636-7.)

(h) The said Circuit Court of Appeals erred in holding that a forest reservation, created by proclamation of the President, excepted and excluded the reserved lands from the operation of the Act of March 3, 1875, granting rights of way to railway companies with the privileges of taking material of earth, stone and timber from the public lands adjacent to the line of the road for the construction thereof.

(46th Assignment of Error, Rec., 637.)

(i) The said Circuit Court of Appeals erred in failing to hold that the grant to the Railway Company of a right of way through said forest reserve, with the privilege of taking material of earth, stone and timber adjacent to the line of its road for the construction thereof was, by the terms of the President's proclamation of November 6, 1906, creating said reserve, excluded from such reservation.

(47th Assignment of Error, Rec., 637.)

(j) The said Circuit Court of Appeals erred in holding that the provisions of the Act of Congress, approved March 3, 1899, namely, "that in the form provided by existing law the Secretary of the Interior may file and approve surveys and plats of any right of way for a wagon road, railroad or other highway over and across any forest reservation or reservoir site when in his judgment the public interests will not be injuriously affected thereby," operated either as a grant, or vested in the Secretary of the Interior authority to make a grant, of such right of way, or that it authorized the Secretary of the Interior to prevent the location and construction of railways in forest reservations by railway companies who had accepted the grant made by Congress by the Act of March 3, 1875, by duly filing a certified copy of their articles of incorporation and due proofs of their organization in the office of the Commissioner of the General Land Office.

(48th Assignment of Error, Rec., 637-8.)

(k) The said Circuit Court of Appeals erred in holding that the provision of the Act of March 3, 1899, authorized the Secretary of the Interior to impose conditions upon the approval of maps of railway location by railway companies who had become grantees under the provisions of the Act of March 3, 1875, requiring such railway companies to purchase and pay for right of way,

or for timber standing thereon, or for material of earth, stone and timber taken from adjacent lands of the United States for the purpose of constructing such railway.

(49th Assignment of Error, Rec., 638.)

(l) The said Circuit Court of Appeals erred in holding that the Secretary of the Interior had power, under the provisions of the Act of March 3, 1899, to limit within the boundaries of forest reserves the grants made by the Act of March 3, 1875, to a grant of land only for right of way purposes.

(50th Assignment of Error, Rec., 638.)

(m) The said Circuit Court of Appeals erred in failing to hold that the defendant had the right to cut and remove without charge therefor all timber growing upon its right of way.

(51st Assignment of Error, Rec., 638.)

(n) The said Circuit Court of Appeals erred in failing to hold that the defendant could not lawfully be required to enter into any stipulation with the United States as a condition precedent to obtaining the approval of its right of way maps filed pursuant to the provisions of the Act of March 3, 1875, and the rules and regulations of the Interior Department of the United States promulgated thereunder.

(38th Assignment of Error, Rec., 629-30.)

II.

THE UNITED STATES CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE DECREE ENTERED BY THE DISTRICT COURT FOR THE RECOVERY OF DAMAGES CAUSED BY DEPOSITING DEBRIS IN STREAMS.

Under this assignment we shall consider the following errors specified in the assignment of errors and prayer for reversal:

(a) The Circuit Court for the District of Idaho erred in denying the exception, upon the ground that such matter was impertinent, filed by appellant to the following matter contained in the 10th paragraph of the bill of complaint, beginning at about the twelfth line after the first series of land descriptions contained in said paragraph, namely:

> "And has thrown, rolled and deposited, and is throwing, rolling and depositing great quantities of rock, earth, gravel and debris in the St. Joseph River in divers places, adjacent to said pretended right of way, whereby the St. Joseph River has been and is obstructed and rendered wholly unfit and useless for purposes of navigation and log-driving, and will continue to be unfit and useless for purposes of navigation and log-driving until said rock, earth, gravel and debris is removed therefrom."

And the said Circuit Court of Appeals erred in affirming the order of the said Circuit Court denying such exception.

(1st Assignment of Error, Rec., 595.)

(b) The said Circuit Court erred in overruling the demurrer to the portion of said bill set forth in Assignment No. 1, which demurrer was interposed upon the following specified grounds, namely:—(a) that the said complainant had no interest in said matter; (b) that the said defendant was not answerable as to said matters to the said complainant but to the State of Idaho; and (c) that the said complainant was not entitled to any relief with respect to said matters.

And the said Circuit Court of Appeals erred in affirming the order of the said Circuit Court overruling such demurrer.

(2nd Assignment of Error, Rec., 595-6.)

(c) The District Court for the District of Idaho, Northern Division, erred in failing to sustain the defendant's objections to the questions propounded to the

witness Dorr Skeels as to the navigability for logs of the East Fork and Little North Fork streams and in admitting over said objections and considering the testimony given by said witness in response to such questions, for the reason that said testimony was irrelevant, immaterial and incompetent under the issues in this case.

The substance of the testimony to which this assignment relates is as follows:

> Coming down the river from the junction of the Little North Fork and East Fork, the first obstruction of which I prepared a memorandum was in the river at a point a little above the east portal of Tunnel No. 30 in the SE¼ of Sec. 7, Tp. 46 North, Range 6 East. The rock at that point was thrown into the creek, filling the channel completely from bank to bank at the normal stage of water and backing the water for a distance of about 200 feet. The next obstruction coming down the river was at the east portal of Tunnel No. 31 on the line between sections 7 and 18, partly in each section, Tp. 46 N., R. 6 East. The boulders and broken rock were thrown from the right of way into the channel so as to completely fill it and back the water into the stream for a considerable distance, making log-driving impossible. The next obstruction of which I have any memorandum was at the west portal No. 31 in the NE¼ of Sec. 18, Tp. 46 N., R. 6 E. Boulders and broken rock were thrown from the fill at the portal of the tunnel into the channel of the stream so as to completely fill it and back the water into the stream for a distance of several hundred feet, making log-driving impossible. The next obstruction was from 100 ft. to 200 ft. below the west portal of Tunnel No. 32 in the SW¼ of Sec. 18, Tp. 48 N., R. 6 E. The rock fills the channel of the creek for 200 ft. along its course and has already formed a big jam of driftwood above it, the rock in the stream rendering log-driving impossible. The next point was at the west portal of No. 33 in Sec. 24, Tp. 46 N., R. 5 E. The rock was thrown down along the base of a large fill, filling the creek channel completely with broken rock for a length along the creek of 250 ft., blocking up the water for 700 ft. above the obstruction, rendering

log-driving impossible. All of the distance for which the water is backed and the reference to filling the stream is at the normal stage of water. The next obstruction is about three-eighths of a mile and below the west portal of Tunnel No. 33 in SE¼ of Sec. 46 N., R. 5 E. Several large masses of rock ten to twenty feet in diameter have been thrown into the creek and filled its bed for a width of fifty feet, rendering the stream unfit for log-driving. The next obstruction is a short distance above the east portal of Tunnel 34, SW¼ of Sec. 25, Tp. 46 N., R. 5 E.; several large boulders from 8 to 16 ft. in diameter have been thrown from the right of way into the creek forming a complete obstruction to log-driving. The next obstruction was about a mile from Avery where the creek channel has been completely filled by a fill made to form a right of way and the channel of the creek destroyed and thrown into the surrounding country to make its own channel.

The railroad ran along the course of the river and they built the fill out to fill the river, throwing the stream out over the lower bank to cut its way around the fill.

I know of my own knowledge that these obstructions were made by the Chicago, Milwaukee & St. Paul Railway Company of Idaho.

The Government has more than 2,000,000 ft. of merchantable timber on the waters of this stream above the rock obstructions to which I have testified. For more than half of this timber the sole means of transportation is by the North Fork of the St. Joe River. For the remaining part of the timber which I mention, the best and cheapest method of transportation is by the North Fork of the St. Joe River, although it might at great cost be gotten up to the right of way and loaded on the railroad and transported in that manner.

NOTE: All testimony concerning the condition of the river and obstructions therein was received subject to appellant's objection that there was no equity in such matters and that such evidence was incompetent and immaterial under the issues in this case. These objections were included in the specifications of objections to the

admissions of evidence filed in the District Court but upon which the court made no specific ruling. It, however, considered and gave effect to such objectionable testimony in the opinion filed and in the decree.

And the Circuit Court of Appeals erred in sustaining the action of the said District Court with respect to such objections and objectionable testimony.

(3rd Assignment of Error, Rec., 596-599.)

(d) The said District Court erred in failing to sustain the defendant's objection to the interrogatories propounded to the witness Rutledge relative to the condition of the St. Joe River and its tributaries, which objection was upon the ground that such matter was incompetent under the issues in this case and that any damages, if the navigability of the stream was impaired, would be properly the subject of an action at law and could not be gone into in this suit in equity.

The witness Rutledge, notwithstanding the defendant's objections, gave testimony of the same character and import as that of the witness Skeels relating to the depositing of rock and debris in said river and its tributaries.

And the said Circuit Court of Appeals erred in sustaining the action of said District Court with respect to such objection and objectionable testimony.

(4th Assignment of Error, Rec., 599-600.)

(e) The said District Court erred in failing to sustain the defendant's objection to the interrogatories propounded to the witness Hamilton relative to the condition of the North Fork and other streams and their suitability for driving logs, which objection was interposed upon the ground that such matter was incompetent under the issues in this case and afforded no ground for equitable relief.

The witness Hamilton, notwithstanding defendant's objections, gave testimony of the same general character

and import as the testimony of the witness Skeels relating to the depositing of rock and debris in said river and its tributaries.

And the said Circuit Court of Appeals erred in sustaining the action of said District Court with respect to such objection and objectionable testimony.

(5th Assignment of Error, Rec., 600.)

(f) The said District Court erred in finding that the plaintiff was entitled to recover of the defendant the sum of $5,500 on account of rock and other debris thrown into the St. Joe River and its tributaries.

And the said Circuit Court of Appeals erred in affirming such finding by the said District Court.

(6th Assignment of Error, Rec., 600-1.)

III.

THE UNITED STATES CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE DECREE ENTERED BY THE DISTRICT COURT FOR THE RECOVERY OF DAMAGES CAUSED BY THE DESTRUCTION OF TIMBER BY FIRE.

Under this assignment we shall consider the following errors specified in the assignment of errors and prayer for reversal:

(a) The Circuit Court for the District of Idaho, Northern Division, erred in overruling a demurrer interposed by the defendant to the following portion of the bill of complaint herein, namely: To so much of said bill as charges that this defendant, through lack of proper precaution against fire, has set and caused to be set numerous fires along, upon and adjacent to said pretended right of way, and has thereby burned and destroyed, and caused to be burned and destroyed, a large amount of timber, young growth and seedlings, to wit: 4,045,700 feet board measure of merchantable timber

and 1,344½ acres of seedlings upon the land specifically described in said bill of complaint.

Which demurrer was interposed upon the specified ground that there was no equity in such matter and that the said complainant had as to such matters a plain, speedy and adequate remedy at law.

And the said Circuit Court of Appeals erred in affirming the order of the said Circuit Court overruling such demurrer.

(7th Assignment of Error, Rec., 601.)

(b) The said Circuit Court erred in overruling the demurrer to the following portion of the bill of complaint herein, namely: To so much of said bill as charges that this defendant is setting and causing to be set, fires along, upon and adjacent to said pretended right of way; and is burning and destroying and causing to be burned and destroyed, great quantities of timber, young growth and seedlings to the damage of said complainant, which demurrer was interposed upon the assigned grounds that there was no equity in such matters, that as to such matters, if true, there was a plain, speedy and adequate remedy by the ordinary process of law; that said acts, if done unlawfully or intentionally, were punishable by indictment and under the laws of the United States defining and providing for the punishment of misdemeanors and felonies.

And the said Circuit Court of Appeals erred in affirming the order of the said Circuit Court overruling said demurrer.

(8th Assignment of Error, Rec., 601-2.)

(c) The said District Court erred in overruling the defendant's objection to the introduction of all testimony relative to fires, interposed upon the ground that whatever damages resulted from fires would have to be recovered in an action at law, and that a court of equity

was without jurisdiction to pass upon such matters, and that such testimony was incompetent under the issues in this case.

The substantial part of the testimony given, notwithstanding such objection, and to which this assignment relates, is as follows:

The witness Dorr Skeels testified:

> I know of my own knowledge of fires having been started on the right of way in the summer of 1908. One started at Burns & Jordan's camp; one started in what they call the "loop" at a point where this railroad crosses Kelley Creek; one started at a point a short distance above Sturtevant & Proctor's camp in the N. E. ¼ of Section 7, Tp. 46 N., R. 6 East, and several other fires started along there for which I cannot give a definite location at present.
>
> The fire that started near the Burns & Jordan's camp burned over about 30 acres; the worst fire started in the clearing made at Kelly Creek Bridge and burned north and east to the summit of the Bitter Root Mountains. It covered the greater part of four sections. The fire killed the timber and young growth.
>
> I did not make an estimate of the timber that was burned. I had Mr. Seery make an estimate under my direction.

The witness Richard H. Rutledge testified:

> To a certain extent I am familiar with the burned district testified to by Mr. Skeels. I was on the scene of the "loop fire" or the Kelly Creek fire soon after it started. I know where the fire originated.
>
> The contractors started those fires. I am able to state that the contractors started the fires from the fact that they were using fire in their burning at those places right along, practically continuously, and that there was no other visible source for the fire. I was able to trace the fire by its course from the right of way to the points where it spread.

The witness Henry F. Kottkey gave testimony as follows:

> Practically all the fires but one I had in that dis-

trict, which was a good many, could have been traced, for I have seen a good many of them started from the right of way of the Chicago, Milwaukee & St. Paul Railway Company, ever since they started the construction work. All those fires originated from the brush burning or from sparks from the locomotives which fell into the brush. In 1907 there were at least six or seven fires that originated on the right of way. All those fires I have spoken of originated on the right of way.

There was one fire at the camp of G. O. Foss & Co., where a man had been washing his clothes and left a fire burning; that was one fire that did not originate on the right of way. It went over the right of way and burned timber on each side.

I can recall where the first fire was in 1907. It was Kennedy & Frazier's work at the mouth of Turkey Creek. When that fire started I was patrolling the lower end of the right of way down to the wagon road and a man came on horseback to notify me that there was a fire that got away from a man that was working there at Kennedy & Frazier's. When I got down there it had burned over about five or ten acres. You could trace this fire; fire leaves a track. I didn't see it start.

Kennedy & Frazier were contractors working on the road for the Chicago, Milwaukee & St. Paul.

The next fire that I recall in 1907 was from Charlie Johnson, contractor. That was east of the south of Kelly Creek. When it started I was, I guess, about three or four miles from the place where the fire started. I had been there that forenoon and seen the man burning the right of way and, of course, I draw my conclusions that when the fire got away it started from there.

The witness Otto F. Hanson testified:

I saw one fire. It originated about 300 yards from where I was living; it kept me fighting fire for a while. That fire started about 200 yards west of Tunnel 30 on the right of way. It burned over about forty acres. Most of that area was covered with small timber. It went all the way from pretty near brush up to six or eight inches. It was lodgepole, yellow pine and fir, all mixed.

The witness Daniel F. Seery testified:

I made an estimate of the timber that was standing on the burned district near the right of way. I commenced on what was known as the "loop fire" and worked in connection with the men appointed by the railroad company.

By the indication on the ground I could see that the fire started close to the steel bridge they were constructing across Kelly Creek. The fire ran north and to the west side of Section 7 north up Kelly Creek and extended into Section 6, same township and range, across over in easterly direction, Section 5, same township and range, into Section 8, to the west side of Section 8, crossing over in a northeasterly direction into Section 9, close to the Richmond mine and east to the Monitor mine, in Section 8, back in a southwesterly direction to the "loop" in Section 8. This map I hold before me contains a correct description of the burned area as described by me and the approximate acreage. Mr. Baker and I did make an estimate of the amount of timber that was burned over on each subdivision, and that amount is correctly stated on that map.

I noted the amount of seedlings that were burned.

I talked the matter over with Mr. Baker and Mr. Long; they did not assume the responsibility for the fire but they did for the timber that was destroyed, and eventually assumed the responsibility for the fire.

The witness identified Exhibit 35 introduced in evidence to show the acreage burned over and the kinds and quantities of the timber burned, for which the Government seeks to recover damages in this case.

NOTE.—The defendant objected to the introduction of any testimony relative to fires for the reason that whatever damages resulted from fires would have to be recovered in an action at law; that a court of equity was without jurisdiction to pass upon such matter and that it was incompetent under the issues in this case. It was asked that this objection should be considered as going to all of the testimony in regard to fires. Such ob-

jection was further assigned in the specification of objections to the admission of evidence (see Assignment 14, Rec., 105), but no direct ruling with respect thereto was made by the District Court, which court, however, considered and based in part its ruling upon such testimony and its action in this regard was affirmed by the United States Circuit Court of Appeals.

The said Circuit Court of Appeals erred in affirming the action of the said District Court in disregarding such objection and admitting and considering the testimony objected to.

(9th Assignment of Error, Rec., 602-3-4-5-6-7.)

(d) The said District Court erred in refusing to sustain the defendant's objection, based upon the ground that it was a self-serving statement, incompetent and not properly verified, to Plaintiff's Exhibit No. 35 which is a tabulated statement showing the legal subdivisions of land, the acreage, kinds and quantities of timber therein, burned, with respect to which the plaintiff claimed and was awarded damages. The testimony with respect thereto is substantially as follows:

> This paper you hand me is my report, the amount of timber of the various kinds. That report was made October 12, 1908. I compiled this report every night; I took it first upon a note book and afterwards when I went in at night I wrote it in ink here. That comprises the legal subdivisions by forties of all the fires from the "loop" down to Arnold's Camp—the territory covered by the four maps. No one assisted me in the preparation of this report, but Mr. Baker had an exact copy of it. We compared it and checked it over. When they were finished, I did deliver a copy of this report to Mr. Day.

The said Circuit Court of Appeals erred in affirming the action of the said District Court in admitting this exhibit.

(10th Assignment of Error, Rec., 607-8.)

(e) The said District Court erred in failing to sustain the defendant's objection to the following question asked of the witness Seery:

"What was the amount of damage agreed upon between you and Mr. Baker and Mr. Long?"

This question was objected to upon the ground that Mr. Baker and Mr. Long were not shown to have authority to make any agreement in that behalf. The witness Seery, notwithstanding the objection, gave the following answer to said question:

"At $4 per thousand $16.182.80. The amount of seedlings was 1344¼. mixed seedlings at $10 per acre. I put that arbitrarily and I found since that it would cost more than that to reseed that area."

The said Circuit Court of Appeals erred in affirming the action of the said District Court with respect to said objection.

(11th Assignment of Error, Rec., 608-9.)

(f) The said District Court erred in failing to sustain the defendant's objection upon the same grounds to the following question asked of the witness Seery:

"What was the total amount agreed between you and Mr. Long?"

To which the witness answered:

"$29,627.20."

The said Circuit Court of Appeals erred in sustaining the action of the said District Court with reference to said objection.

(12th Assignment of Error, Rec., 609.)

(g) The said District Court erred in failing to sustain the defendant's objection to the admission in evidence of the Plaintiff's Exhibit "1A" offered in evidence in connection with the testimony of the witness Rockwell. The exhibit was objected to, in so far as it purported to show values, upon the ground that they were based upon an incorrect method of arriving at the value of the tim-

ber destroyed and upon the further ground that the qualification of the witness to testify as to values had not been shown.

Exhibit "1A" is a tabulated statement on four sheets showing in columns descriptions of area to which the figures refer, the subdivisions of sections, the condition of young trees, the age of immature timber on the areas burned and a variety of matters on which the witness based theoretical estimates of the values which young trees would have after reaching maturity, estimating the age of 100 years to be maturity of that class of timber.

The said Circuit Court of Appeals erred in affirming the action of the said District Court in admitting and considering said exhibit.

(13th Assignment of Error, Rec., 609-10.)

(h) The said District Court erred in failing to sustain the defendant's objection to the introduction of Plaintiff's Exhibit "2A," the ground of objection being, as stated, that so far as showing quantities of timber in burned areas, it was a duplicate of Plaintiff's Exhibit "1A"; that in so far as it purported to show the cost of restocking and the value of the timber arrived at in that manner, it was immaterial, irrelevant and incompetent, the method not being a proper one to get at the market value of young timber, and upon the further ground that the qualifications of the witness to testify as to the cost had not been established.

Exhibit "2A" consists of three sheets, attached together, containing tabulated statements compiled for the purpose of showing what it would cost to restock the areas of immature timber burned and to care for such timber until it had arrived at the age at which it was estimated the burned timber had arrived.

The said Circuit Court of Appeals erred in affirming

the action of the District Court with respect to the admission and consideration of said exhibit.

(14th Assignment of Error, Rec., 610.)

(i) The said District Court erred in failing to sustain the defendant's objection to the admission of Plaintiff's Exhibit "3A," the grounds of said objection being the same as those interposed to the admission of the Plaintiff's Exhibit "1A." Said exhibit consists of two sheets attached together containing tabulated statements of the same nature and import as Plaintiff's Exhibit "1A."

(15th Assignment of Error, Rec., 610-11.)

(j) The said District Court erred in failing to sustain the defendant's objection to the admissibility of the Plaintiff's Exhibit "4A," the grounds of said objection being the same as those interposed to the admission of Plaintiff's Exhibit "2A," and the further ground of objection to the admissibility of all of said exhibits being specified, namely: That they are not competent under the issues of this case, the remedy for such injury, if any, being at law and a court of equity having no jurisdiction.

Plaintiff's Exhibit "4A" consists of two sheets containing tabulated statements of the same nature and import as Plaintiff's Exhibit "2A."

The said Circuit Court of Appeals erred in affirming the action of the said District Court with respect to the admission and consideration of said Exhibit "4A."

(16th Assignment of Error, Rec., 611.)

(k) The said District Court erred in failing to grant defendant's motion to strike out all of the testimony of the witness Rockwell for the reasons assigned and the various objections interposed, and for the further reason that it appears that in his estimates of the cost he allowed an unwarrantable rate of interest based on the

estimated value of the timber at maturity, and that there was no definite allowance for insurance or the probability that the timber would have been destroyed from other causes, and upon the further ground that the testimony was not competent, as furnishing any basis for equitable relief.

The substance of the testimony of said witness is as follows:

> As a forest officer I made an examination of burned areas along the right of way of the Chicago, Milwaukee & St. Paul Railway Company in the Coeur d'Alene National Forest in Idaho during the summer and fall of 1909. I had for my guidance in making that examination, maps, and have those maps with me. Daniel F. Seery identified this map as a copy of one used by him in his examination of this same area. This map shows the area that was burned over by the fire extending along the Milwaukee right of way. I located the area burned on the ground and compared the area with the map. The burned area, located in T. 46 N., R. 7 E., extended over land aggregating 1,016 acres in Sections 5, 6, 7, 8, 9, 17 and 18. That covers all the areas in this particular burn. I first made a casual examination to see the extent of the burn and what damage the fire had done and then made a study of the timber in the vicinity and what species were growing in that locality, what the rate of growth was and how much timber an acre of land would produce. I selected areas in the adjoining green timber which were growing under exactly the same conditions as were found on the fire areas, and carefully surveyed the plots. Then I measured the timber on each area. I calipered the trees, breast high, to find out how many trees there were of each diameter and of each species, and after having determined this, I selected average trees of the various diameters and cut these down; measured the diameters of the logs to determine the board feet contained, and in every case determined the age of the trees. From the volume of the average trees I determined the total volume per acre. I determined that the age at which the stand became merchantable was one hundred years. At the average age of one hun-

dred years, the average diameter of the white pine was a little over twelve inches and red fir and larch slightly larger than that. I determined that the area was seventy-five per cent. fully stocked and I had found from my examination of adjoining areas that fully stocked stands of that same kind of timber at one hundred years produced a certain amount of timber which would have a corresponding value at the stumpage rate of $4 per thousand. This would be the value of that young growth at maturity. The stand, however, was destroyed at fifteen years of age, so for eighty-five years the Government would be required to care for that area to protect it. To ascertain the value of the present stand at fifteen years of age, I subtracted the cost of caring for the stand for eighty-five years from the value which could have been received for the timber at maturity—the amount per year per acre which would have been necessary to expend in the care of that area if it had not been destroyed by fire would have been three cents per acre. After determining what the value of the timber would be at maturity minus the cost of caring for the timber for the remaining time which the timber would have to stand in order to mature, the amount thus obtained was discounted to the present time by compound interest tables at three per cent. There were ten acres of immature timber ninety years of age, thirty per cent. white pine, fifty per cent. Douglas fir, fifteen per cent. white fir, and five per cent. western larch. I determined that it has a value of $576.35. I considered that the most practicable means which might be used in restoring this legal subdivision to its condition before the fire to be planting. The cost would be $15 per acre for replanting the stand with the same kind of young trees as were there before the fire. Taking the eight acres upon which the stand had an average of fifteen years, the total cost would be $143.76 for replanting that area with the species that had been destroyed and caring for the growth until it reached the age at which it was destroyed, and on the area of ten acres on which the average was ninety years, the total cost to the Government of replanting that area and caring for it until it reached the age of ninety years would be $1,129. Since part of this timber has been

merchantable, however, the value of the merchantable part, $400, was subtracted from the total to get the value of the young growth alone, or $739. In the preparation of these sheets, Exhibits 1A, 2A, 3A and 4A, I used the method first described.

The said Circuit Court of Appeals erred in affirming the action of the said District Court with respect to such motion and in considering the said testimony.

(17th Assignment of Error, Rec., 611-615.)

(l) The said District Court erred in failing to sustain the defendant's objections to the testimony of the witness William W. Morris.

It was admitted, subject to the same objections interposed to Mr. Rockwell's testimony, that Mr. Morris would, if examined at length, testify to the same facts already covered in Mr. Rockwell's testimony relating to the examination of the sample areas described and the computation of the quantities of timber found upon these sample areas, as well as the ages of the trees and their diameters.

The said Circuit Court of Appeals erred in affirming the action of said District Court with respect to said testimony and in considering the same.

(18th Assignment of Error, Rec., 615.)

(m) The said District Court erred in failing to sustain the defendant's motion to strike the testimony of the witness F. A. Silcox as to the cost of fire protection. Said motion was made upon the ground that the testimony was incompetent, immaterial and irrelevant under the issues in this case. The substance of the testimony of said witness is as follows:

That in the district which includes the Coeur d'Alene National Forest, in connection with its timber sale work and fire protection, the Government is spending for all work about $742,000,000 which makes, on 29,000,000 acres approximately 2½ cents per acre. For administration and timber sales it

would be approximately one cent an acre and about one-half a cent an acre for fire protection proper. I figured that for three cents an acre we could put a man on fire patrol who can take care of the timber sale work on the present basis with a reasonable increase in sales and, in addition, provide one man for fire patrol to every thirty acres, depending on the fire danger. Of course, fire danger cannot be entirely eliminated, but it will be reduced to a minimum, so much that we feel it will be fairly safe. On a basis of one man for one-half township, he would be within approximately three miles of any fire started.

The said Circuit Court of Appeals erred in affirming the action of said District Court with respect to said testimony and in considering the same.

(19th Assignment of Error, Rec., 615-16.)

(n) The said District Court erred in finding that the plaintiff was entitled to recover from the defendant the sum of $12,000 on account of mature timber burned, and in including said amount in the sum for the recovery of which a decree was entered.

The said Circuit Court of Appeals erred in affirming the finding and decree of the said District Court with respect to the said sum of $12,000 on account of mature timber burned.

(20th Assignment of Error, Rec., 616-17.)

(o) The said District Court erred in finding that the plaintiff was entitled to recover the sum of $24,000 for immature timber burned, and including such amount in the total sum for which it entered a decree in favor of the said plaintiff.

The said Circuit Court of Appeals erred in affirming the finding and decree of the said District Court with respect to the said sum of $24,000 for immature timber destroyed by fire.

(21st Assignment of Error, Rec., 617.)

IV.

THE UNITED STATES CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE DECREE FOR THE RECOVERY OF DAMAGES FOR TIMBER DESTROYED BY CUTTING.

Under this assignment, we shall consider the following of the errors specified in the Assignment of Errors and Prayer for Reversal:

(a) The said Circuit Court erred in overruling the following demurrer to a portion of the bill of complaint herein, namely:

> "To so much of said bill as charges that the said defendant has cut and caused to be cut upon the said strip of land one hundred feet in width on each side of the center line of defendant's right of way, and prays relief with respect thereto; for that it appears from the face of said bill that the said defendant had full right and authority to so cut and cause to be cut, and remove and cause to be removed, said timber; and for the further reason that there is no equity in said matters, or any thereof."

Said demurrer being set forth in the fourth paragraph of the demurrer filed herein.

The said Circuit Court of Appeals erred in affirming the ruling of the said Circuit Court upon said demurrer.

(22nd Assignment of Errors, Rec., 617-18.)

(b) The said Circuit Court erred in overruling the defendant's demurrer to a portion of said bill, said demurrer being as follows, to wit:

> "To so much of said bill as charges that the said defendant has cut and removed, and caused to be cut and removed, a large amount of timber upon an additional strip of land upon the uphill side of said right of way, and upon land adjacent to said strips; for that it appears from the face of said bill that there is no equity in said matters, or in any thereof."

Said demurrer being set forth in the 5th paragraph of the demurrer filed herein.

The said Circuit Court of Appeals erred in affirming the ruling of the said Circuit Court with respect to said demurrer.

(23rd Assignment of Error, Rec., 618.)

(c) The said Circuit Court erred in overruling the following demurrer to a portion of said bill, namely:

> "To so much of said bill as charges that the said defendant has cleared, and caused to be cleared, and is clearing and causing to be cleared, portions of said lands for the purpose of constructing a railroad, and has constructed and caused to be constructed and is constructing and causing to be constructed, a railroad; and has conducted and is so conducting its operations that it has destroyed and caused to be destroyed and is destroying and causing to be destroyed, large amounts of small timber and young growth upon the land theretofore described in said bill, through unskilled methods of lumbering; for the reason that it appears upon the face of said bill that there is no equity in said matters."

Said demurrer being set forth in the sixth paragraph of the demurrer filed herein.

The said Circuit Court of Appeals erred in affirming the ruling of the said Circuit Court with respect to said demurrer.

(24th Assignment of Error, Rec., 618-19.)

(d) The said District Court erred in failing to sustain the defendant's objection to all testimony concerning timber cut and the value thereof, which objection was interposed upon the ground that there was no equity in such matters and that such evidence was incompetent and immaterial under the issues in this case, which objection was understood to apply to the testimony of all the plaintiff's witnesses upon these matters.

The substance of the testimony to which this assignment relates was given by different witnesses called in behalf of the plaintiff to the effect that along the defendant's right of way crossing specific subdivisions of land

owned by the Government timber was cut and consumed by the defendant in the construction of its railroad; that other merchantable timber was cut for the purpose of clearing the right of way and was destroyed; that other timber was cut on land adjacent to the right of way, partly in compliance with requirements of the officers and agents of the United States Forestry Service for clearing the ground, and partly for use in the construction of the railroad. The witness Skeels further testified that he made examination of such lands for the purpose of determining the quantities of timber so cut, had made notes of his examinations, measurements and estimates to determine the amount of acreage, the quantity of timber of different kinds so cut and destroyed, and he and other witnesses testified as to the values thereof. Mr. Skeels further testified that from his examination and memorandum Exhibits 2 to 33 and Exhibit 34 were made up, all of which exhibits are attached to the evidence which was submitted to the trial court.

The said District Court made no rulings on defendant's objections, either sustaining or overruling the same, although the defendant in due time filed written specifications of the particular matters and items of evidence objected to which called for specific rulings as to said matters, but the said District Court, as is apparent from the opinion filed and the decree entered, considered such testimony.

The said Circuit Court of Appeals erred in sustaining the action of the said District Court with respect to said objection and in considering the testimony so objected to.

(25th Assignment of Error, Rec., 619-20.)

(e) The said District Court erred in failing to sustain the defendant's objection to the testimony of the witness Dorr Skeels as to the quantity of timber cut and timber values, which objection was based upon the following

grounds, to wit: (a) That under the issues of this case such questions were irrelevant and immaterial; that under the pleadings no questions of quantities of timber were involved; and (b) that under the admissions in the pleadings and in the stipulation, the defendant had the right to take all the timber on the 200-feet right of way and all other timber adjacent to the right of way which it needed for construction purposes.

The testimony of the witness, Mr. Skeels, so objected to, was in substance as follows:

> That he was Forest Officer on the Coeur d'Alene Forest Reserve, acting as assistant to the supervisor, Mr. Rutledge, in the spring of 1907; that in that spring the Milwaukee Railway started actual construction work upon its railway through the Forest Reserve; that he cruised first, the right of way, 200 feet in width; that he had made a report of this work, but did not have such report with him; that the railway company finally cleared the right of way over 200 feet in width, and that he had with him a report of a cruise which he made of the right of way as finally cleared; that in some places it was cleared over 200 feet in width on each side of the center line, and that it would vary 250 feet in places; that the extra clearing was done because, in the construction of the railway by the Milwaukee Company in Montana through the Helena Forest Reserve, the Forestry officers required them to clear a strip 200 feet in width on the upper side of the center line depending somewhat on the topography, and that it was agreed that if the railway company was allowed to proceed with the construction of the railroad through the Coeur d'Alene National Forest it would do the work in the same way; that the railway company's representative, Mr. Day, stated to the witness repeatedly that the company desired to comply with the usual regulations required by the Forest Service when railroads were building through national forests; that the witness had the estimates he made of the timber cut over the right of way as finally agreed upon and it was, as stated, irregular in width; that the estimates showed the amount of timber cut on the forty-

acre subdivision and the number of acres which they cut over in each forty acres, beginning at the Montana line in Section 26, Township 47 North, Range 6 E., P. M.; that at the close of each day he worked up his notes and entered the data on the map; that the report which he had before him was in nearly every case made at the close of the day when the estimate was made; that sometimes he might go two or three days before working up the data on the maps in his report; that it would depend a good deal on the way the work went; that he began to work about June, 1908, and finished it near the close of September, 1908."

The witness then testified, refreshing his memory from the memorandum before him, as to the quantity of timber on two forty-acre tracts, and, without further identification, Exhibits 2 to 33, inclusive, being the memoranda prepared by the witness as to the estimates of the timber cut, were read into the record and received in evidence, subject to the objections of the defendant. The witness then stated that he had a report which he made to the forester of the Forestry Service, stating the amount of timber which was cut by the railway company on its right of way and on the strip along the right of way in building the road through Coeur d'Alene National Forest; that it was a compilation of Exhibits 2 to 33, inclusive. This compilation was then offered and received in evidence over the defendant's objection as to its competency and marked Plaintiff's Exhibit 34. The witness then testified as to the market value of the timber.

The said Circuit Court of Appeals erred in affirming the action of the said District Court in failing to sustain the defendant's objection to the testimony of the said witness Skeels, in considering said testimony, and in affirming the decree of said District Court.

(26th Assignment of Error, Rec., 620-623.)

(f) The said District Court erred in failing to sus-

tain the defendant's objections to the admission in evidence of Plaintiff's Exhibits 2 to 33, inclusive, on the ground that the documents which the witness was asked to read into the record were not his original memoranda, but compilations prepared by him from his original memoranda and therefore not admissible as books of original entry, and that not being admissible evidence, they could not be gotten into the record by having the witness read them into the record; that being inadmissible in themselves they could not properly be used by the witness or read into the record under guise of refreshing his memory and because the purpose of the testimony was to get the inadmissible documents themselves before the court.

The exhibits referred to consist of tabulated statements giving the quantity of feet of each kind of timber cut upon each Government subdivision. The testimony showing that these exhibits were not original memoranda, but compilations subsequently prepared by the witness is set forth in the statement of the substance of the witness' testimony under the last preceding assignment of error and is not therefore here repeated.

The said Circuit Court of Appeals erred in affirming the action of the said District Court in admitting and considering said exhibits and in thus considering said exhibits in its affirmance of the decree of said District Court.

(27th Assignment of Error, Rec., 623-24.)

(g) The said District Court erred in failing to sustain defendant's objection to the admission in evidence of Exhibit 34, for the reason that the same was incompetent was not an original memorandum, but was a compilation prepared by the witness Dorr Skeels at times subsequent to the time for obtaining information from original sources.

Exhibit 34 is a document too voluminous to be quoted. The manner in which it was prepared has been heretofore stated in giving the substance of the testimony of the witness Skeels in Assignment of Error No. 26.

The said Circuit Court of Appeals erred in affirming the action of the said District Court in admitting and considering said exhibit and in thus considering said exhibit in its affirmance of the decree of said District Court.

(28th Assignment of Error, Rec., 624-25.)

(h) The said District Court erred in finding that the plaintiff was entitled to recover from the defendant the sum of $26,989 for timber cut upon the right of way and contiguous lands and in including such sum in the total amount which it decreed the plaintiff should have and recover of and from the said defendant.

The said Circuit Court of Appeals erred in affirming the finding of the said District Court to the effect that the plaintiff was entitled to recover from the said defendant said sum of $26,989 for timber cut, and in including said sum in the total amount which it was decreed the plaintiff should recover of the said defendant.

(29th Assignment of Error, Rec., 625.)

V.

THE UNITED STATES CIRCUIT COURT OF APPEALS ERRED IN FAILING TO HOLD THAT APPELLEE WAS NOT ENTITLED TO EQUITABLE RELIEF.

Under this assignment we shall consider the following of the errors specified in the Assignment of Errors and Prayer for Reversal:

(a) The said Circuit Court of Appeals erred in failing to hold that the following demurrer, duly interposed to the bill of complaint, should have been sustained, viz:

"To the said bill for that the same is without

equity and does not set forth any matters entitling said complainant to any relief from this court."

(31st Assignment of Error, Rec., 626.)

(b) The said Circuit Court of Appeals erred in failing to hold that the so-called "Peck Agreement" (set forth in the Bill) was invalid.

(32nd Assignment of Error, Rec., 626-27.)

(c) The said Circuit Court of Appeals erred in failing to hold that such agreement, if valid, was one which a court of equity would not specifically enforce.

(33rd Assignment of Error, Rec., 627.)

VI.

THE UNITED STATES CIRCUIT COURT OF APPEALS ERRED IN REFUSING TO HOLD THE BILL MULTIFARIOUS.

Under this assignment we shall consider the following of the errors specified in the Assignment of Errors and Prayer for Reversal:

The said Circuit Court of Appeals erred in failing to hold that the following demurrer interposed to the filing of the complaint herein, should have been sustained:

> "To said bill for that the same is multifarious in this: That the said complainant has joined in said bill matters for which the said complainant has a plain, speedy and adequate remedy at law with matters of equitable cognizance, the said matters being separate and distinct; that the said complainant has joined in said bill a cause of action arising out of an obstruction of a highway of the State of Idaho, and with which the said complainant has nothing to do, with a cause of action for damages arising out of alleged negligent acts of said defendant in setting out fires and thereby burning and destroying timber, together with an alleged cause of action for wilful waste and continuous trespass."

(30th Assignment of Error, Rec., 625-26.)

VII.

THE UNITED STATES CIRCUIT COURT OF APPEALS ERRED IN REFUSING TO HOLD THAT THE DISTRICT COURT WAS WITHOUT JURISDICTION TO AWARD TO APPELLEE ANY MONEY DAMAGES WHATSOEVER.

Under this assignment we shall consider the following of the errors specified in the Assignment of Errors and Prayer for Reversal:

The said Circuit Court of Appeals erred in failing to hold that the said Circuit Court and its successor the said District Court, were without jurisdiction in this action to award to the complainant damages for the following matters, to wit:

(a) For timber cut or removed from the right of way or contiguous land.

(b) For timber burned.

(c) For immature timber destroyed.

(d) For injuries sustained by rock and other debris thrown into the St. Joe River, or its tributaries; and in denying unto the said defendant the right to a trial by jury upon said several matters.

(37th Assignment of Error, Rec., 629.)

VIII.

THE UNITED STATES CIRCUIT COURT OF APPEALS ERRED IN FAILING TO HOLD THAT THE DECREE ENTERED HEREIN WAS INCONSISTENT WITH ANY RIGHT OF RECOVERY BY APPELLEE, FOR TIMBER CUT FROM THE RIGHT OF WAY OR FOR MATERIAL OF EARTH, STONE AND TIMBER TAKEN FOR CONSTRUCTION PURPOSES FROM LANDS ADJACENT TO THE RIGHT OF WAY SUBSEQUENT TO MAY 10, 1907.

Under this assignment we shall consider the following of the errors specified in the Assignment of Errors and Prayer for Reversal.

The decree entered herein, having provided that the maps filed by the defendant should be deemed filed and approved as of May 10, 1907, the United States Circuit Court of Appeals erred in failing to hold that as to all timber cut from the right of way, and as to all material of earth, stone and timber taken for construction purposes from lands adjacent to said right of way subsequent to said date of May 10, 1907, the complainant was not entitled to any compensation whatsoever.

(52nd Assignment of Error, Rec., 638-9.)

ARGUMENT.

Point I.

THE UNITED STATES CIRCUIT COURT OF APPEALS ERRED IN FAILING TO HOLD THAT APPELLANT IS ENTITLED TO THE RIGHT OF WAY THROUGH THE FOREST RESERVE UNDER THE ACT OF MARCH 3RD, 1875, AND TO TAKE MATERIAL OF EARTH, STONE AND TIMBER FROM ADJACENT LANDS FOR CONSTRUCTION PURPOSES WITHOUT PAYMENT THEREFOR.

Appellant contends that it was, at the times mentioned in the bill, vested with legal title to the right of way (two hundred feet in width) upon which its road was constructed, together with the right to take from lands adjacent to such right of way, material of earth, stone and timber for construction purposes. These rights are asserted under the provisions of the Act of March 3rd, 1875. The facts, showing compliance by appellant with the conditions of this act, are stipulated and are set forth in the "Statement of Facts" at the beginning of this brief.

No question is made as to the sufficiency of these acts to entitle appellant to the benefits of the Act of March 3rd, 1875, if the lands within the Forest Reserve were subject to the provisions of that act. The sole conten-

tion is, that the lands involved were excluded from the operation of the Act of March 3rd, 1875, by the following orders, viz.: (a) The order of March 21st, 1905, made by the Commissioner of the General Land Office, by which he "*temporarily*" withdrew from sale and disposal these lands "pending a decision of the President as to the advisability of creating a National Forest thereof." (Bill, Rec., 6; Answer, Rec., 60-1; Stipulation, Par. 3; Rec., 183-184); (b) The proclamation of the President of November 6th, 1906, creating the Coeur d'Alene Forest Reserve. (Stipulation, Par. 8; Rec., 196-198.) And the effect of these orders upon the acquisition of rights by appellant under the Act of 1875, is the only question under this point, in determining which, careful consideration of the provisions of the Acts of March 3rd, 1875 (18 Stat., 482), and March 3rd, 1899 (30 Stat., 1219, 1233), supplemental thereto, is essential.

ACT OF MARCH 3RD, 1875.

This act is as follows, omitting immaterial parts:

"Section 1. That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, sidetracks, turnouts, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

Section 3. That the Legislature of the proper ter-

ritory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned.

Section 4. That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way.

Section 5. That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands especially reserved from sale, unless such right of way shall be provided for by treaty stipulation or by act of Congress heretofore passed."

The act has been before this court in a number of cases, and certain legal propositions with respect thereto have been settled.

(a) *The grants made by this act are grants in praesenti of lands to be identified at some future period.*

Although the act is general, and contains neither the name of a grantee nor a description of the lands granted, it is, nevertheless, settled, that the grants thereby made are present grants as distinguished from grants *in futuro* or a mere promise to make grants.

> "The uniform construction of this act has been, that it is a grant '*in praesenti*' of lands to be thereafter identified."
>
> *Stalker* v. *O. S. L. R. Co.*, 225 U. S., 142, 146.
>
> *Noble* v. *Union River Logging R. Co.*, 147 U. S., 165, 176.
>
> *Jamestown & N. R. Co.* v. *Jones*, 177 U. S., 125, 130.

Minnesota, etc., Ry. Co. v. *Doughty,* 208 U. S., 251, 258.

What is meant by a grant *in praesenti* of lands to be thereafter identified, is placed beyond question by repeated decisions of this court:

> "It creates an immediate interest, and does not indicate a purpose to give in future. 'There be and is hereby granted' are words of absolute donation, and import a grant *in praesenti.* * * * They vest a present title * * * although a survey of the lands and a location of the road are necessary to give precision to it and attach it to any particular tract. The grant then becomes certain, and by relation has the same effect upon the selected parcels as if it had specifically described them. In other words, the grant was a float until the line of the road should be definitely fixed."

L. L. & G. R. Co. v. *U. S.,* 92 U. S., 733, 741.

M. K. & T. Ry. Co. v. *K. P. Ry. Co.,* 97 U. S., 491, 496.

St. P. & P. R. Co. v. *N. P. R. R. Co.,* 139 U. S., 1, 5.

This definition of grants *in praesenti* of lands to be hereafter identified, has been so often reiterated by this court that further citation of authority would be idle. While the three cases above cited relate to grants of lands to aid in the construction of roads, as distinguished from right of way grants, the same rule of construction is uniformly applied to grants of the latter class.

R. R. Co. v. *Baldwin,* 103 U. S., 426, 429-30.

Ry. Co. v. *Alling,* 99 U. S., 463, 475.

Bybee v. *O. & C. R. Co.,* 139 U. S., 663, 679-80.

M. K. & T. Ry. Co. v. *Cook,* 163 U. S., 491, 497.

N. P. Ry. Co. v. *Ely,* 197 U. S., 1, 5.

N. P. Ry. Co. v. *Hasse,* 197 U. S., 9, 10.

Stuart v. *U. P. R. Co.,* 227 U. S., 342, 353-4.

(b) *A railway company becomes a grantee under the Act of* 1875 *when, being qualified, it accepts the provisions of the act and identifies itself as such grantee by filing with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same.*

In *Dakota Cent. R. R. Co.* v. *Downey,* 8 L. D., 115, 117, Secretary Vilas, speaking with reference to this act, said:

> "It will be noticed that there is one point of difference between the present grant of this act and those where a single grantee, as a state or a railroad company, is named. In this grant, not only is the land indefinite in location, and therefore a float —in the language sometimes employed with respect to grants of land to aid in the construction of railroads or otherwise—but the particular corporation is indefinite and uncertain. In order, then, to make this grant attach, it is necessary to provide a fixity of grantee, as well as fixity of location upon the ground.
>
> To determine what company shall be considered as a grantee or beneficiary under this act, the first section provides simply that it shall be 'any railroad company organized under the laws of any state or territory * * * which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same.' *Immediately, therefore, upon the filing of these two documents, the company stands in the attitude of being named in the act, as entitled to its benefits, so far as the grantee is concerned— I think no farther; and that thereafter its relation is the same as that of the state; or the particular railroad company, to which, by similar acts grants of lands have been made for such purpose.*" (The italics are ours.)

See, also:

Montana Ry. Co., 21 L. D., 250.

St. P. M. & M. Ry. Co. v. *Maloney,* 24 L. D., 460, 461.

Kootenai Valley R. R., 28 L. D., 439, 440, *et seq.*

In *Jamestown & N. R. Co.* v. *Jones*, 177 U. S., 125, 130, this court sustained the foregoing construction of the statute by Mr. Vilas, as proper and in harmony with the decision in *Noble* v. *R. R. Co.*, 147 U. S., 165, saying:

> "This case (*Noble* v. *R. R. Co.*, 147 U. S., 165), establishes that a railroad company becomes specifically a grantee by filing its articles of incorporation and due proofs of its organization under the same with the Secretary of the Interior. It was also so held by Mr. Secretary Vilas in *Dakota Central R. R. Co.* v. *Downey*, 8 Land Decisions, 115."

See, also:

> *Minneapolis, etc., Ry. Co.* v. *Doughty*, 208 U. S., 251, 258.

> "By the authorities and decisions on the subject, it is conceded that, as soon as any corporation referred to in the first section of said act, files with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization, such corporation becomes a grantee just as specifically and as definitely as if the name of the corporation were entered in the act itself."

> *O. S. L. R. Co.* v. *Stalker*, 14 Idaho, 362; 94 Pac. Rep., 56, 62; Affd., 225 U. S., 142.

(c) *A railway company, when identified as a grantee under the Act of* 1875, *is immediately vested with the right and authority to proceed with the construction of its road, and, for such purpose, to enter upon the desired right of way and to take from public lands adjacent thereto material of earth, stone and timber necessary for construction.*

While this has not been specifically ruled by this court, it is a necessary consequence of the construction, now settled, that a grantee under the Act of March 3, 1875, may locate and identify the right of way granted, by construction as well as by filing a map of location.

> *Jamestown & N. R. Co.* v. *Jones*, 177 U. S., 125, 130-132.

> *Barlow* v. *N. P. Ry. Co.*, 240 U. S., 484, 487-8.

The right to fix location by construction, necessarily implies the right to construct, and as construction involves not only occupation of the right of way but the taking of material, it follows that these rights are vested in a grantee who has become identified as such, prior to the filing or approval of maps of location. Any other conclusion involves the absurdity of holding that while the act contemplates fixing the location by construction, it prohibits construction until after the location is fixed. This conclusion is recognized in the decisions of the Department of the Interior:

> "Where, as in the matter under consideration, the question is one solely between the United States and the company claiming the benefits of the provisions of the act, all that is necessary in order to entitle the company to the right to take, from the public lands adjacent to the line of its proposed road, material, earth, stone and timber, necessary for the construction thereof, is the filing of its articles of incorporation and due proofs of organization, as provided for in the first section of the act; for, if the full privileges of the grant made by the act can be secured by the construction of the road without the previous filing of the map of location, * * * the right to take stone and timber must exist before construction, for the use to be made of the material, earth, stone and timber is limited to the construction of the road."
>
> *Kootenai Valley R. R.*, 28 L. D., 439, 441-2.
>
> *De Weese* v. *Henry Investment Co.*, 39 L. D., 27, 32-33.

Disregarding for the present, for reasons hereafter given, the temporary withdrawal of March 21st, 1905, the application of the above propositions to the facts here, determines that *appellant's grant under the Act of March 3rd, 1875, is prior in time to the creation of the Coeur d'Alene National Forest.* Appellant became identified as a grantee under the Act of 1875, February 17th, 1906, when the certified copy of its articles of in-

corporation and proofs of its organization were accepted and filed. The proclamation creating the Forest Reserve, was November 6th, 1906, or over eight months later. Whether, under the Act of March 3rd, 1875, the grants of rights of way, when identified, relate back to the date of the granting act, taking effect as of that date, or whether such grants when identified, relate back only to the date when the company became identified as a grantee under the act, has never been decided by the courts, nor is it necessary that it be decided in the present case. Whichever date be the correct one, the grant to appellant antedates the creation of the Forest Reserve.

Construing the grants *in praesenti* of rights of way to be thereafter identified, made by various special acts of Congress, this court has repeatedly held that, in the absence of reservations or exceptions contained in the granting act, the title of the grantee to the right of way, when identified, relates back to, and takes effect, as of the date of the granting act, and, being prior in time, is prior in right, to all claims, rights or reservations initiated or created subsequent to the date of the granting act.

R. R. Co. v. *Baldwin,* 103 U. S., 426, 429-30.
Bybee v. *O. & C. R. R. Co.,* 139 U. S., 663, 679-80.
Stuart v. *U. P. R. R. Co.,* 227 U. S., 342, 353-4.

That this construction is applicable to the Act of March 3rd, 1875, and that the title of the grantee to the right of way, when identified, relates back to, and takes effect as of, a date at least as early as that of the identification of the grantee, cutting off all subsequent claims, rights or reservations, *not excepted by the terms of the act,* cannot be doubted. Unless, therefore, the exceptions to be found in the Act of 1875 are sufficiently broad to

include the Forest Reserve and to permit the Executive Department, to cut off and extinguish the rights which appellant had acquired in the lands involved by identification of itself as a grantee, the acts of appellant, in occupying and appropriating the right of way for two hundred feet in width and in taking from adjacent lands of the United States material of earth, stone and timber, for construction purposes, were not unlawful and afford no basis for a claim for compensation.

THE EXCEPTIONS IN THE ACT OF 1875.

The only provisions excepting lands from the operation of the Act of 1875, are embodied in the following clauses of that act:

(a) Section one grants the right of way in terms "through the public lands of the United States."

(b) Section three authorizes the condemnation of "possessory claims on the public lands of the United States."

(c) Section five provides:

> "That this act shall not apply to any lands within the limits of any military park or Indian reservation, or other lands especially reserved from sale, unless such right of way shall be provided for by treaty stipulation or by act of Congress heretofore passed."

(a) *The term "public lands," as used in right of way grants, including those made by the Act of* 1875, *is not used in a sense exclusive of lands withdrawn or reserved.*

It was contended by appellee in the lower courts that the lands involved were not public lands after the withdrawal of March 21st, 1905, or after the President's proclamation, because such term is habitually used to indicate only such lands belonging to the United States as are subject to sale or other disposition under the general laws, and that as the grant made by Section 1 of

the Act of 1875, is of right of way through only "the public lands of the United States," it did not embrace these lands. While this court held, in *Wilcox* v. *Jackson*, 13 Peters, 498, and in subsequent decisions, that the term "public lands" has been habitually used as descriptive of lands of the United States subject to sale or other disposal under general laws, this is not a statutory definition of the term and these words have been repeatedly used in a broader sense.

U. S. v. *Blendaur* (C. C. A.), 128 Fed. Rep., 910, 913.

U. P. Ry. Co. v. *Karges*, 169 Fed. Rep., 459, 462.

Kindred v. *U. P. Ry. Co.* (C. C. A.), 168 Fed. Rep., 648, 652; Affd., 225 U. S., 582, 596.

U. P. Ry. Co. v. *Douglas County*, 31 Fed. Rep., 540.

U. S. v. *Minnedoka S. R. Co.* (C. C. A.), 190 Fed. Rep., 491, 494.

An examination of Congressional legislation granting rights of way through the public lands, shows that *for more than twenty years immediately preceding the passage of the Act of March* 3, 1875, *Congress had never used the term "public lands" in these grants in a sense other than as inclusive of lands in withdrawals and reservations.*

By act approved August 26th, 1852 (10 Stat., 35) Congress provided:

> "That there be, and is hereby, granted to said state, the right of locating a canal through the public lands, known as the Military Reservation of the Falls at St. Maries River, in said state; and that four hundred feet of land in width extending along the line of such canal be, and the same is hereby, granted * * * for the construction and convenience of such canal."

By act approved February 8, 1859 (11 Stat., 381) Congress provided:

> "That the right of way through, and the privi-

lege of constructing depots and workshops on, the public lands of the United States lying in the County of St. Clair, State of Michigan, commonly called the Fort Gratiot Military Reservation, be, and the same is hereby, granted to any railroad company. * * * And provided further, that all the buildings to be erected upon said reservation shall be of wood, and if, at any time, it should be deemed expedient by the commanding officer of Fort Gratiot, or by any other higher military authority, to destroy such buildings by fire or otherwise, no claims shall be made against the United States for damages."

By act approved June 10th, 1852 (10 Stat., 8), Congress provided:

"Section 1.—* * * That the right of way *through the public lands* be, and the same is hereby, granted to the State of Missouri, for the construction of railroads, * * * with the right also to take necessary materials of earth, stone and timber for the construction thereof, from the public lands of the United States adjacent to said railroads. * * *

Section 2.—* * * That there be, and is hereby, granted to the State of Missouri, for the purpose of aiding in making the railroads aforesaid, every alternate section of land designated by even numbers for six sections in width on each side of said road; * * * *And provided further,* that any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be and the same are hereby reserved to the United States from the operation of this act, *except so far as it may be found necessary to locate the route of said railroads through such reserved lands; in which case the right of way only shall be granted.*"

This proviso makes it clear that the right of way grant made by Section 1 included "reserved lands," but as the only right of way granted by Section 1 was, in terms, "through the public lands" only, the term "public

lands'' in this right of way grant was necessarily used in a sense broad enough to include the reserved lands.

From this time, every grant to a state to aid in the construction of railroads contained these, or similar, provisions with respect to the right of way over reserved lands.

Act	approved	February 9, 1853 (10 Stat., 155).
"	"	June 29, 1854 (10 Stat., 302).
"	"	May 15, 1856 (11 Stat., 9).
"	"	May 17, 1856 (11 Stat., 15).
"	"	June 3, 1856 (11 Stat., 17).
"	"	June 3, 1856 (11 Stat., 20).
"	"	August 11, 1856 (11 Stat., 30).
"	"	March 3, 1857 (11 Stat., 195).
"	"	March 3, 1863 (12 Stat., 772).
"	"	March 3, 1863 (12 Stat., 797).
"	"	May 5, 1864 (13 Stat., 64).
"	"	May 5, 1864 (13 Stat., 66).
"	"	May 12, 1864 (13 Stat., 72).
"	"	June 20, 1864 (13 Stat., 140).
"	"	June 25, 1864 (13 Stat., 183).
"	"	July 2, 1864 (13 Stat., 355).
"	"	July 4, 1866 (14 Stat., 83).
"	"	July 4, 1866 (14 Stat., 86).
"	"	July 4, 1866 (14 Stat., 87).
"	"	July 5, 1866 (14 Stat., 89).
"	"	July 23, 1866 (14 Stat., 210).
"	"	July 25, 1866 (14 Stat., 236).
"	"	July 26, 1866 (14 Stat., 289).
"	"	February 25, 1867 (14 Stat., 409).
"	"	March 3, 1869 (15 Stat., 340).

In addition to the acts granting lands to states to aid in the construction of railways, above cited, in each of which Congress made it clear that the right of way grant "through the public lands'' was intended to include a right of way through "reserved lands," Congress, between 1862 and 1871, made a number of grants direct to railway companies for the purpose of aiding in the construction of their proposed railroads.

Act approved July 1, 1862 (12 Stat., 489).
" " July 2, 1864 (13 Stat., 365).
" " July 27, 1866 (14 Stat., 292).
" " July 13, 1866 (14 Stat., 94).
" " July 25, 1866 (14 Stat., 239).
" " March 2, 1867 (14 Stat., 548).
" " March 3, 1871 (16 Stat., 573).

The first of these made to aid in the construction of the Union Pacific, by act approved July 1st, 1862, was the model upon which the remainder of these direct grants were framed. Their phraseology differs somewhat from that employed in the grants to the states first referred to, and the policy of making the right of way grant applicable to reserved lands was not as clearly expressed as in the acts making the grants to the states. There was nothing, however, to indicate that the term "public lands," as used in the sections granting rights of way, was used in a different or narrower sense than in the contemporaneous and similar grants to states; and the whole policy embodied in these Pacific railroads grants was inconsistent with, and prohibits, an interpretation of the right of way grants which would make the latter less liberal or effective than the right of way grants embodied in the acts granting lands to states to aid in the construction of railroads. The provisions of the Pacific railroads grants evinced throughout a disposition to be far more generous than in the grants to states to aid in what were considered local roads. The rights of way granted were wider; they included, not only right of way but station grounds, which were not given in grants to states. The quantities of lands granted to aid in the construction of the Pacific railroads, were, in most cases, double those conferred in state grants. To the Union Pacific there was granted, in addition, direct financial aid in the form of United States bonds. This policy of greater generosity in connection with these roads is so

inconsistent with the idea that burdens were placed upon them in the acquisition of rights of way, from which the local roads were free, that only the clearest declaration of such purpose would justify the conclusion that the term "public lands" in these right of way grants was used in a narrower and more restricted sense than in the grants to states.

In addition to the foregoing grants of right of way and lands, Congress, between 1869 and March 3, 1875, made a number of right of way grants to railway companies, unaccompanied by land grants.

Act of March 3, 1869 (15 Stat., 325).
" " December 15, 1870 (16 Stat., 395).
" " April 12, 1872 (17 Stat., 52).
" " June 1, 1872 (17 Stat., 202).
" " June 1, 1872 (17 Stat., 212).
" " June 4, 1872 (17 Stat., 224).
" " June 7, 1872 (17 Stat., 280).
" " June 8, 1872 (17 Stat., 339).
" " June 8, 1872 (17 Stat., 340).
" " June 8, 1872 (17 Stat., 343).
" " March 3, 1873 (17 Stat., 612).
" " June 23, 1874 (18 Stat., 274).
" " February 5, 1875 (18 Stat., 306).
" " March 3, 1875 (18 Stat., 509).

The granting terms in these acts were substantially like the grants of rights of way in the various Pacific railroads acts; and in two thereof, Congress made it clear that the term "public lands," as used therein, included reserved lands.

The Act approved June 7, 1872 (17 Stat., 280), provided:

> "Section 1. That there is hereby granted to the Jacksonville & St. Augustine Railway Company * * * a right of way through the public lands of the United States * * * for 100 feet in width on each side of the track of said railway company * * * with the right to take from said lands, or from any of the public lands adjacent thereto, stone, timber, earth or other material to be used in the

> construction and repair of said railroad; and said company shall also have the right to enter upon any of the public lands, or lots of lands, the property of the United States, and take the same for depots, shops, sidetracks, or necessary uses of said railroad; provided, that no lot or tract of land so taken shall exceed forty acres in one place. *No military reservation shall be crossed or appropriated unless the consent of the Secretary of War be first obtained, and then only under such restrictions as he shall establish.*"

The Act approved June 23, 1874 (18 Stat., 274), provided:

> "That the right of way through the public lands be, and the same is hereby, granted to the Arkansas Valley Railway Company, * * *. Said right of way is granted to said railway company to the extent of one hundred feet * * * *where it may pass through the public domain and military reservation at Fort Lyon,* including grounds for station buildings." * * *

Congress having made it clear in the acts granting lands to states and in these Acts of June 7th, 1872, and of July 23rd, 1874, that the grants of rights of way "through the public lands of the United States" were operative upon reserved lands—in other words, that the term "public lands," as used in the right of way acts, was not used in a sense exclusive of reservations—and there being nothing in the other acts indicative of a purpose when granting rights of way to use the term "public lands" in a narrower sense, it must be presumed that this term was used with the same meaning in all of these right of way grants.

> "The same clause, relating to the same subject, and enacted in pursuance of the same policy, did not have one meaning in one grant and a different meaning in another."
>
> *U. S.* v. *Morrison*, 240 U. S., 192, 205.

That these right of way grants were operative upon

reserved lands, notwithstanding that the grants were, in terms, of rights of way "through the public lands" only, has been the construction placed thereon by the courts.

M. K. & T. R. Co. v. *Roberts,* 152 U. S., 114.

M. K. & T. Ry. Co. v. *Watson,* 74 Kan., 494; 87 Pac. Rep., 687, 689.

Coleman v. *St. P. M. & M. Ry. Co.,* 38 Minn., 260; 36 N. W. Rep., 638, 639.

U. P. Ry. Co. v. *Douglas County,* 31 Fed. Rep., 540.

Kindred v. *U. P. Ry. Co.* (C. C. A.), 168 Fed. Rep., 648; Affd. 225 U. S., 582.

U. P. Ry. Co. v. *Karges,* 169 Fed. Rep., 459.

U. S. v. *D. & R. G. Co.,* 190 Fed. Rep, 825, 845-7.

See, also:

U. S. v. *Minnedoka & S. W. R. Co.* (C. C. A.), 190 Fed. Rep., 491, 494-5.

Riverside Township v. *Newton,* 11 S. D., 120; 75 N. W. Rep., 899.

Peterson v. *Baker,* 39 Wash., 275; 81 Pac. Rep., 681.

This review of right of way legislation establishes that Congress had, since 1852, uniformly used the term "public lands" in right of way grants, as inclusive of lands reserved or withdrawn, and the existence of a public policy that such grants should be operative over and across reserved lands. And when, in Section 1 of the Act of March 3, 1875, Congress used the familiar form of grant, namely, "that the right of way through the public lands is hereby granted," it must be presumed, in the absence of words indicating a contrary intention, that the term "public lands," was there used in the same sense in which Congress had uniformly used it during more than twenty years in making the cognate grants, viz: as inclusive of reserved and withdrawn lands.

2 Lewis' Sutherland's Statutory Construction (2nd Ed.), Sec. 1072; id., Secs. 443, 447.

And that Congress did use the term "public lands" in Section 1 as inclusive of all lands subject to the power of disposition by Congress, including lands reserved or withdrawn, is clearly shown by the provisions of Sections 3 and 5 of the act.

Section 3, by expressly authorizing the condemnation of possessory claims on public lands, clearly implies that the interest of the United States is granted, subject only to the obligation of the grantee to make compensation to the private claimant for his interests taken; while the express exclusion, by Section 5, of lands within the limits of any military, park or Indian reservation, clearly indicates the Congressional understanding that the grant, notwithstanding it was of a right of way through public lands, only, would have been operative through such reservations but for this exception.

> "It is a rule of construction acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power that which was not granted, —that which the words of the grant could not comprehend."
>
> *Gibbons* v. *Ogden*, 9 Wheaton, 1, 191.
>
> *Commonwealth* v. *Summerville*, 204 Pa., 300; 54 Atl. Rep., 27, 29.
>
> Lewis' Sutherlands' Statutory Construction (2nd Ed.), Sec. 351.

(b) *Possessory claims on the public lands.*

Section 3, authorizing the condemnation of "possessory claims on the public lands of the United States," by implication excludes from the grant such possessory claims. As noted above, however, this exception is rather of the private interest of the claimant than of the lands which belong to the United States and over which the right of way is apparently granted subject to the obligation to condemn the interest of the private claimant.

(The practice in the Department is to receive maps where *unpatented* land is affected, and to approve them subjecting to "existing valid claims."

Regulations, May 21, 1909 (37 L. D., 787), Pars. 18, 4.)

As no question of possessory claims arises here, this exception does not require consideration. It is sufficient to note that it is, in principle, like the exception of preemption, homestead and other claims initiated prior to the filing of a map of definite location, found in all of the grants of land to aid in the construction of railways. It is not inconsistent with the doctrine that the grant is one *in praesenti* or that the title to right of way, when identified, relates back to a date at least as early as the time when the grantee became identified by filing its articles of incorporation and proofs of organization, although in a number of cases this clause led federal circuit and state supreme courts to erroneously hold the grant not to be one *in praesenti*. The judgments of these courts were correct, because, by virtue of this implied exception, possessory claims initiated prior to the identification of the right of way, were protected as against the floating grant, but the reason assigned, namely, that the grant was not one *in praesenti*, was erroneous. We may note as examples of such decisions the following:

S. F. & N. Ry. Co. v. *Ziegler* (C. C. A.), 61 Fed. Rep., 392.

R. R. Co. v. *Sture*, 32 Minn., 95; 20 N. W. Rep., 229.

D. & R. G. R. Co. v. *Wilson*, 28 Col., 6; 62 Pac. Rep., 843, 845.

(c) *The withdrawal or reservation for the Forest Reserve did not operate to bring the lands within the provisions of Section* 5 *of the act, providing that it should not "apply to any lands within the limits of any military, park or Indian reservation, or other lands especially reserved from sale."*

1. *Section 5 does not exclude from the application of the act, all reservations or reserved lands.*

Congress having, in 1841, provided for the acquisition of pre-emption rights in public lands, excluded from the operation of that law certain lands, as follows:

> "The following classes of lands, unless otherwise especially provided for by law, shall not be subject to the rights of pre-emption, to wit:
> *First.* Lands included in any reservation by any treaty, law, or proclamation of the President, for any purpose * * *." (Revised Statutes, Sec. 2258.)

The Homestead Act of 1862, by limiting its application to those lands which were "subject to pre-emption," made the same exception. (Rev. Stat., Sec. 2289.)

The Act of June 10, 1852 (10 Stat., 8), granting lands to the State of Missouri to aid in the construction of railroads, excepted from the lands granted reserved lands, by the following provision:

> "And provided further, that any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operation of this act. * * *"

And this formula, descriptive of the lands excepted from the operation of the grant because reserved, was followed without material variation in all of the land grant acts passed prior to 1862.

Act approved February 9, 1853 (10 Stat., 155).
" " June 29, 1854 (10 Stat., 302).
" " May 15, 1856 (11 Stat., 9).
" " May 17, 1856 (11 Stat., 15).
" " June 3, 1856 (11 Stat., 17).
" " June 3, 1856 (11 Stat., 18).
" " June 3, 1856 (11 Stat., 20).
" " June 3, 1856 (11 Stat., 21).
" " August 11, 1856 (11 Stat., 30).
" " March 3, 1857 (11 Stat., 195).

In the Union Pacific Act of July 1, 1862 (12 Stat., 489), Congress adopted the following formula for the purpose of excluding reserved lands, namely:

> "That there be, and is hereby, granted to the said company, * * * every alternate section of public lands, designated by odd numbers, to the amount of five alternate sections per mile, on each side of said railroad * * * not sold, reserved, or otherwise dis- at the time the line of said road is definitely fixed." posed of by the United States, and to which a pre- emption or homestead claim may not have attached,

And this formula, with immaterial variations, was used in all grants of land thereafter made direct to railway companies to aid in the construction of railroads.

Act	approved	July 2, 1864 (13 Stat., 365).
"	"	July 27, 1866 (14 Stat., 292).
"	"	July 13, 1866 (14 Stat., 94).
"	"	July 25, 1866 (14 Stat., 239).
"	"	March 2, 1867 (14 Stat., 548).
"	"	March 3, 1871 (16 Stat., 573).

After the passage of the Union Pacific Act of July 1, 1862, the formula used in the grants of lands to states to aid in the construction of railroads, was modified so as to include, in addition to the formula used in the acts preceding the Act of July 1, 1862, a formula substantially identical with that used in the grants to railway companies direct. Thus in the first act approved March 3, 1863 (12 Stat., 772), Congress provided:

> "That there be, and is hereby, granted to the State of Kansas, * * * every alternate section of land, designated by odd numbers, for ten sections in width on each side of said roads and each of its branches. But in case it shall appear that the United States have, when the lines or routes of said road and branches are definitely fixed, sold any section or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, *or that the same has been reserved by the United States for any purpose whatever, then* it shall be the duty of the Secretary of the Interior to cause to be selected * * * so much

land, * * * as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the rights of pre-emption or homestead settlements have attached as aforesaid. * * * *And provided further, that any and all lands heretofore reserved to the United States, by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operations of this act,* * *."

This formula, with immaterial variations, was followed in most of the aid grants to states made thereafter.

Act approved May 5, 1864 (13 Stat., 64).
" " May 5, 1864 (13 Stat., 66).
" " May 12, 1864 (13 Stat., 72).
" " June 20, 1864 (13 Stat., 140).
" " June 25, 1864 (13 Stat., 183).
" " July 4, 1866 (14 Stat., 83).
" " July 4, 1866 (14 Stat., 87).
" " July 23, 1866 (14 Stat., 210).
" " July 25, 1866 (14 Stat., 236).
" " July 26, 1866 (14 Stat., 289).

In a few acts making aid grants, passed subsequent to March 3, 1863, however, the formula in use prior to the passage of the Union Pacific Act of 1862, was in substance followed.

Act approved March 3, 1863 (12 Stat., 797).
" " July 2, 1864 (13 Stat., 355).
" " July 4, 1866 (14 Stat., 86).
" " July 5, 1866 (14 Stat., 89).
" " Feby. 25, 1867 (14 Stat., 409).
" " March 3, 1869 (15 Stat., 340).

It thus appears that Congress, in excepting lands from the grants made in aid of these internal improvements, (1st) followed closely fixed formulae in expressing its intent, and (2nd) that the formulae, thus uniformly used, expressed the purpose to exclude *all* reserved lands in clear, unmistakable language. This policy of excepting all reserved lands from the land grants was in sharp

contrast with what was, as we have seen, an equally fixed policy of not excepting reserved lands from right of way grants.

In the Act of March 3, 1875, Congress departed from the familiar phraseology used in the land grant acts, and which clearly expressed a purpose to except all reserved lands, and substituted in lieu thereof a phraseology new in land grant and right of way legislation, viz:

> "That this act shall not apply to any lands within the limits of any military, park or Indian reservation, or other lands especially reserved from sale * * *"

The phraseology thus adopted was not well adapted to the expression of a purpose to exclude all reserved lands from the application of the act. The specific enumeration of three special classes of reservations, viz., military, park or Indian, was, in itself, an indication of a purpose to limit the exclusion, and while the express enumeration of the three classes of reservations was followed by the general clause, "or other lands especially reserved from sale," it must be presumed that Congress was familiar with the rule of construction uniformly applied to acts of this character:

> "When there are general words following particular and specific words, the former must be confined to things of the same kind." Lewis' Sutherland's Stat. Const., 2nd Ed., Sec. 422.

And it must be further presumed that Congress knew, and therefore intended, that the reservations which would be excluded from the application of the act by Section 5, would be restricted by the phraseology employed to military, park or Indian reservations and those of the same character, viz., such as naval reservations, national cemeteries, etc.

The conclusion that it was not the purpose by this language to exclude all reservations, is further supported by the use of the word "especially" as a term modify-

ing and limiting the word "reserved" in the general clause. It was not all reserved lands which were excluded from the operation of the act, but those lands, and those only, which should fall within the description "*especially* reserved," as used in the general clause which itself followed terms of specific enumeration. We further note as giving added significance to the use of this modifying term, that, so far as we have been able to discover, this is the only time that Congress ever used such a limiting expression.

Keeping in mind the uniform policy of Congress, which had obtained for more than twenty years, of not excluding reservations from the operation of right of way grants, and the settled practice of using fixed formulae to express the purpose to exclude reserved lands from the lands granted in aid of works of this nature, which formulae, in clear, definite and well understood terms, excluded *all* such reserved lands, the conclusion is irresistible that when, in the Act of 1875 granting rights of way, Congress adopted a phraseology which not only departed from these familiar formulae but which would not, under well known canons of construction, be construed as including *all* reservations, its intention was that all reservations were not to be excluded from the application of this act.

It is true that the Act of 1875 departed from the long continued public policy of granting rights of way without exception of lands reserved, to the extent that this act excluded from its operation certain reservations. The reason for this departure, however, is clear, and is consistent with a limitation of the excluded reservations. Prior to 1875 all right of way grants had been special, and Congress was in a position to inform itself, in each case, as to what reserves would be traversed by the rights of way, and to protect, by special exclusion, any public

interests requiring such action. The Act of 1875, however, was a general act under which rights of way would be acquired without opportunity for Congress to ascertain or know what particular reserves would be crossed, and the power to protect the public interests by special exclusion adapted to the exigencies of the individual case, was thus lost. It was with this thought in mind that Congress, in the general act, for the first time, excluded from the rights of way granted, certain reservations. But, the purpose being only to protect the public interests, it did not attempt to exclude all reservations, but only those where the public interests might be detrimentally affected by railway intersection; and the act must be construed in harmony with the settled policy of granting rights of way over reservations where such grants were not distinctly detrimental to, or destructive of, the public interest.

2. *Temporary withdrawals and Forest Reserves are not similar in character to Military, Park or Indian Reservations.*

That Congress did not have in mind when passing the Act of March 3, 1875, forest reservations, or reservations of such character or for such purpose, is certain, since such reservations were then unknown, and no authority to create such reservations existed prior to the passage of the Act of March 3, 1891 (26 Stat., 1095), when the forest reservation legislation was initiated. And to justify a ruling that such reservations are within the class which it was the congressional purpose to exclude from the operations of the Act of 1875, it must appear that they are in their character closely analogous to those reserves which Congress had in mind and distinctly specified. Military, park and Indian reservations are created for inhabitancy, or for usage with which the presence of a public railway would, in nearly every case,

be incompatible. In the case of a military reservation, or of a park, like Yellowstone, created to preserve natural beauties, the wild animals, and to serve as a public playground such incompatibility, is at once perceptible. Clear objections to the extension of railways through Indian reservations existed in the well known jealousy of these people in the preservation for themselves of the lands set apart for their use. The construction, maintenance and operation of a railway through such reserves, would be destructive of the tribal isolation which the policy in creating Indian reservations was designed to maintain. It would render difficult, if not impossible, the enforcement of police regulations such as those prohibiting the sale of liquor to Indians, and it would bring about a close contact between the white people and the Indians which history had shown to be the fruitful mother of Indian wars. Forest reserves were for totally different purposes. The Act of March 3, 1891 (26 Stat., 1095), provided that the President might set apart and reserve "public lands wholly or in part covered with timber or undergrowth" as public reservations. The Act of June 4, 1897 (30 Stat., 11, 35), provided that no public forest reservation should be established "except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States." The purpose was not inhabitancy, but the conservation of timber and of water flows and to this end to create a wilderness. The construction of a railway through such wilderness for the purpose of connecting the settled communities on the opposite sides thereof, is not destructive of the reservation or inconsistent with its maintenance and continued use for the purposes for which it was created. Such construction is not detri-

mental to, but in furtherance of, the public interests. The forests are therefore not of the character of reservations which Congress excluded from the operations of the Act of 1875. They are within neither the letter nor the spirit of Section five of that act.

3. *An interpretation of the Forest Reserves Act as authorizing the creation of Reservations which would be excluded from the grants made by the Act of March 3, 1875, is in conflict with the declared policy of the United States.*

The Act of March 3, 1891 (26 Stat., 1095; 7 Fed. Stats. Ann., 310), initiating the system of creating forest reserves by executive proclamation, is as follows:

> "That the President of the United States may, from time to time, set apart and reserve, in any state or territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof."

As in 1891 the public lands wholly or in part covered with timber or undergrowth, were largely confined to the mountain ranges west of the Mississippi River, namely, the Rocky Mountains and ranges to the westward thereof, for the most part parallel with the Rocky Mountains, Congress must have anticipated that, under this act, vast areas of land extending far to the north and south along these mountain ranges, covering passes as well as peaks, would be reserved—an anticipation abundantly realized. And if Congress intended that these reservations should, or understood that they would, bring the reserved lands within the operation of Section 5 of the Act of March 3, 1875, thereby excluding the construction of railways across the same, it must be presumed that Congress understood that this legislation would, and therefore in-

tended that it should, authorize the creation of barriers to the construction of railways necessarily crossing these districts and, particularly, to the construction of transcontinental railways to the Pacific Coast. This is a necessary conclusion from the fact that no provision was made in the Act of March, 1891, for the acquisition of railway rights of way across the forest reserves. This omission was not due to oversight or neglect. The attention of Congress was directed to the probable effect of these reservations upon works of internal improvement and to the necessity of providing for rights of way therefor, within the limits of the forests. Sections 18 and 19 of the act provided:

> "Section 18. That the right of way through the public lands *and reservations* of the United States is hereby granted to *any canal or ditch company* formed for the purpose of irrigation and duly organized under the laws of any state or territory, which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take from the public lands adjacent to the line of the canal or ditch, material, earth and stone necessary for the construction of such canal or ditch; provided, that no such right of way shall be so located as to interfere with the proper occupation by the government of any such reservation, and all maps of location shall be subject to the approval of the department of the government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective states or territories.
>
> Section 19. That any canal or ditch company desiring to secure the benefits of this act shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and

if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way."

The close conformity of these provisions to the language of Sections one and four of the Act of March 3, 1875, makes it certain that Congress had the railway right of way act before it and in mind in drafting this Act of 1891.

A presumption that Congress intended, by the Forest Reserve Act, to authorize the creation of artificial barriers to the construction of railways necessarily crossing the districts which it was well known would be reserved, is in conflict with the public policy of encouraging the construction of transportation lines, which the United States had steadily pursued for nearly seventy years prior to 1891 and which it thereafter continued to pursue. The policy of aiding in the construction of transportation lines by the granting of rights of way therefor, began at least as early as 1823. In that year and continuing until 1852, rights of way over the public domain for such transportation lines had been repeatedly granted.

Act approved February 28, 1823 (3 Stat., 727).
" " May 26, 1824 (4 Stat., 47).
" " March 2, 1831 (4 Stat., 474).
" " March 3, 1835 (4 Stat., 778).
" " July 2, 1836 (5 Stat., 65).
" " March 3, 1837 (5 Stat., 196).
" " January 31, 1837 (5 Stat., 144).
" " June 28, 1838 (5 Stat., 253).
" " March 3, 1849 (9 Stat., 771).
" " March 3, 1849 (9 Stat., 772).
" " Sept. 20, 1850 (9 Stat., 466).

Between the passage of the Act of 1850, above cited, and the passage of the general right of way Act of 1875, nearly fifty additional acts, which we have already cited, were passed granting such rights of way. The general right of way Act of 1875 was thus but the culmination of a long series of special acts. It did not mark the beginning of a narrower policy or indicate any purpose to abandon the long-continued policy theretofore pursued. Instead, it indicated a purpose to continue the previous policy in an even more generous manner. The purpose of the act was to do away with the necessity of applying for special grants in individual cases by permitting *all* railway companies to secure rights of way over the public lands by compliance with a general law. And that the Act of 1891 did not mark a change in, or termination of, this policy, is made clear by the Act of March 2, 1899, where Congress made the following provisions for securing railway rights of way through Indian reservations, a class which had been excluded from the operation of the Act of 1875:

> "Section 1. That a right of way for a railway, telegraph and telephone line, through any Indian reservation in any state or territory, or through any lands held by an Indian tribe or nation in Indian territory, or through any lands reserved for an Indian Agency or for other purposes in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, is hereby granted to any railroad company organized under the laws of the United States, or of any state or territory, which shall comply with the provisions of this act and such rules and regulations as may be prescribed thereunder. * * * (30 Stat., 990; 3 Fed. Stats. Annot., 511-12.) See also Act approved March 3, 1909 (35 Stat., 781; Fed Stat. Annot., Supp. 1909, p. 239).

This policy had been particularly emphasized in con-

nection with the construction of railways connecting the Pacific Coast with the Mississippi Valley and the country to the eastward thereof. The transcontinental railways had been especial favorites. Aid to such lines had been given with more than royal munificence. This clearly declared policy, uniformly pursued through many years, cannot be ignored in construing legislation which impinges thereon. Every presumption is against an interpretation which would conflict therewith and which would permit the creation of insuperable barriers to such railway construction—barriers which Congress, in the light of existing conditions, must have foreseen would be created and would preclude the construction, above all, of the particularly favored transcontinental railways. If such legislation is reasonably susceptible of an interpretation harmonizing it with the declared public policy, that interpretation should be adopted in preference to one which would make it inconsistent with, and destructive of, that policy. That the Act of March 3, 1891, is susceptible of such construction cannot be doubted. We have seen that the Act of March 3, 1875, did not by its terms exclude all reserves. And if Congress did not understand or intend that the reservations authorized by the Act of 1891 should fall within the classes of reserves which were excluded from the provisions of the Act of 1875, then there is no inconsistency between the authority conferred upon the President to create these reservations and the policy of aiding in the construction of railways by the granting of rights of way therefor. Such, we submit, is the proper interpretation of these two acts.

That Congress did not intend the forest reserves to operate as a bar to works of internal improvement and did not consider the granting of rights of way, easements and privileges therein, inconsistent with the exist-

ence or maintenance of such reserves, is made manifest by its legislation. We have seen that in the very act authorizing the creation of such reserves, provision was made for the acquisition of rights of way for canals and reservoirs.

By Act approved May 14, 1896, Congress provided:

"That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way to the extent of twenty-five feet, together with the use of necessary ground, not exceeding forty acres, upon the public lands and forest reservations of the United States, by any citizen or association of citizens of the United States, for the purposes of generating, manufacturing or distributing electric power." (29 Stat., 120; 6 Fed. Stat. Ann., 510-511.)

By Act approved June 4, 1897, it further provided:

"Nothing herein shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of such reservations, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of the Interior. Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof." (30 Stat., 36; 7 Fed. Stats. Ann., 314.)

By Act approved May 11, 1898, it further provided:

"That the rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of Sections eighteen, nineteen, twenty and twenty-one of the act entitled, 'An Act to repeal timber-culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for

the development of power, and subsidiary to the main purpose of irrigation." (30 Stat., 404; 6 Fed. Stat. Ann., 512.)

By Act approved February 15, 1901, it further provided:

"That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant National Parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits, or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: * * *."

(31 Stat., 790; 6 Fed. Stats. Ann., 513.)

By Act approved March 4, 1911, it further provided:

"That the head of the department having jurisdiction over the lands, be, and he hereby is, authorized and empowered under general regulations to be fixed by him, to grant an easement for rights of way for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands, national forests, and reservations of the United States, for electrical poles and lines for the transmission and distribution of elec-

trical power, and for poles and lines for telephone and telegraph purposes, to the extent of twenty feet on each side of the center line of such electrical, telephone and telegraph lines and poles, to any citizen, association, or corporation of the United States where it is intended by such to exercise the right of way herein granted for any one or more of the purposes herein named: * * *."

(36 Stat., 1235.)

It is true that rights of way and privileges granted or authorized by these acts, were made subject to the approval of the department having jurisdiction of the forests. None the less, this legislation demonstrates that it was not the policy of Congress to permit the forest reserves to operate as barriers to works of internal improvement; and, further, that Congress did not consider such rights of way or easements in themselves inconsistent with, or detrimental to, the continued existence or maintenance of the forests.

The improvements for which rights of way and privileges within the forest reserves were thus expressly provided, were local in their character. Their importance to the public was small as compared with the importance of securing the construction of railways, many of which, like that of appellant, would be interstate and transcontinental, serving a large part of the country. Is it conceivable that Congress would thus carefully provide for the protection of these local enterprises within forest reserves, and take no cognizance of those more important enterprises which had been the subject of its especial care for nearly seventy years? Yet if the view that the right of way Act of 1875 was not operative within these forest reserves, is sound, we are forced by this legislation to such conclusion. Any argument leading to such conclusion is inherently unsound. The only reasonable explanation of the silence of Congress upon the subject of railway rights of way across these re-

serves, while it was granting easements within their boundaries for local enterprises, is, that it understood that the reservations which it had authorized for forest purposes by the Act of 1891, were not of the same class as military, park or Indian reservations and were not therefore within the exception in Section 5 of the Act of 1875, and that railway right of way grants were applicable to the lands in such forest reservations.

(4) *Congressional interpretation of the Act of March 3, 1875, embodied in the Act of March 3, 1899.*

The conclusions reached, based upon the construction of the Acts of March 3, 1875, and of March 3, 1891, and subsequent legislation, namely, that forest reserves were not within the classes of reservations excluded from the operation of the Act of 1875, are confirmed by a provision of the Act of March 3, 1899. (30 Stat., 1233; 6 Fed. Stats. Ann., 513.)

This provision appears in an isolated sentence in a deficiencies appropriation act, and reads as follows:

> "That in the form provided by existing law the Secretary of the Interior may file and approve surveys and plats of any right of way for a wagon road, railroad, or other highway over and across any forest reservation or reservoir site when, in his judgment, the public interests will not be injuriously affected thereby."

(a) *The Act of 1899 neither granted rights of way or easements within forest reserves, nor authorized the Secretary of the Interior to make such grants.*

Grants by the United States are never presumed. While the doctrine of strict construction does not apply to general granting acts to the same degree that it does to special grants (*U. S.* v. *D. & R. G. R. Co.*, 150 U. S., 1, 14; *U. S.* v. *St. Anthony R. R. Co.*, 192 U. S., 524, 530 *et seq.*), nevertheless an act will not be construed as making a grant unless the intention so to do appears with reason-

able certainty. Doubts are resolved against the existence of the grant.

The Act of 1899 contains no words of grant, nor does it purport to confer upon the Secretary of the Interior any authority to make one. It authorizes the Secretary to file and approve surveys and plats of any right of way for a wagon road, railroad, or other highway over and across any forest reservation or reservoir site. There is no doubt or obscurity with respect to this authority. The doubt and obscurity arise when the attempt is made to infer from this provision that Congress intended, that as a consequence of the filing and approval of such surveys and plats, a grant of a right of way, easement or license should be made. No such purpose is declared in the act and no language is to be found therein which can, by any process of construction, be twisted into a declaration of such purpose. Nevertheless, the appellee, the District Court and the Court of Appeals, confronted with the problem of finding a purpose for this enactment after having held that the Act of 1875 was inoperative within these reservations, have read into this provision a grant of a right of way or easement, or authority in the Secretary of the Interior to make such grant. This construction, assuming, as it does, inability upon the part of Congress to express its purposes in definite terms, is unjustifiable. Congress had familiar formulae which it habitually used in expressing a purpose to make such grant or to confer such authority. We have heretofore cited numerous acts granting rights of way and covering the period extending from 1823 to 1875. In these acts the purpose of making the grant had been expressed in apt, certain and definite terms, namely: "there is hereby granted," or "there be and is hereby granted."

In the Act of March 3, 1891, *supra*, the grant of right

of way through public lands and reservations was made to canal and ditch companies by the familiar phraseology "the right of way * * * is hereby granted."

In the Act of May 14, 1896, *supra*, the authority to the Secretary of the Interior to permit the use of an easement over the public lands and in forest reserves for the purpose of generating, manufacturing or distributing electric power, was made in clear terms:

> "The Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way to the extent of twenty-five feet, together with the use of necessary ground," etc.

Similar language is found in the Acts of Feb. 15, 1901, *supra*, and March 4, 1911, *supra*.

In the Act of March 2, 1899, *supra*, providing for the acquisition of rights of way by railway companies through Indian Reservations, the language is "that a right of way * * * through any Indian Reservation * * * is hereby granted." This act was under consideration by Congress at the same time that the Act of March 3, 1899, was receiving its attention. If the purpose of the Act of March 3, 1899, was to grant, or to authorize the granting of such right of way or easement, through forest reservations, the two enactments were closely akin, their purposes identical, save as to the class of reservation through which the right of way was to be given. And, if this were the case, is it not certain that Congress—a body very apt, in such laws, to follow precedent in phraseology—would have expressed that purpose in its familiar formula of words, or, at least, in terms equally clear, definite and certain? The rule that public grants are not presumed and the omission in this act of all terms of grant and of all provisions expressive of any purpose to make or authorize such grant, emphasized as it is by the complete departure from the

phraseology which had been habitually used for many years when it was the purpose to make or authorize such grants,—a phraseology again employed in the contemporaneous granting Act of March 2, 1899—prohibit a construction of the Act of March 3, 1899, as an act either making, or authorizing the making, of a grant.

Not only is the Act of March 3, 1899, wholly and utterly insufficient in itself to make or authorize a grant, but it is equally insufficient when considered as supplemental (as it undoubtedly is) to previous legislation. It was contended by appellee in the courts below and, we presume, will be here, that the Act of March 3, 1899, was a separate and distinct grant in itself, but that the words "in the form provided by existing law" had reference, so far as railway rights of way were concerned, to the Act of March 3, 1875, and, by such reference, imported into the Act of 1899 the provisions of Section 4 of the Act of 1875 providing for the identification of rights of way over surveyed lands by filing maps. The District Court found this construction untenable, saying (207 Fed., 170):

> "Let us suppose that the 'existing law' simply prescribed forms of procedure, and conferred no right; the provision in itself contains no words of grant, and upon what theory could it be contended that the Secretary's approval would operate to effect a grant or confer any right whatsoever? It would, therefore, seem that to render the enactment effective for any real purpose, it becomes necessary not only to import the forms and procedure, but also a measure, at least, of the potency and effect signified thereby in the system from which they are borrowed." (Rec., 147.)

So ruling, the District Court held that the Act of 1899 must be construed as supplemental to the Act of 1875, saying (207 Fed., 171):

> "That in the express adoption of the forms and procedure in that act prescribed, and the authoriza-

> tion of the Secretary of the Interior, at his discretion, to file and approve maps and surveys tendered in conformity therewith, there is necessarily implied the intent that such approval shall operate to consummate a right of way grant, such as would be effected by a like approval of similar plats and surveys upon public unreserved lands under the Act of 1875."

The court held, however, that the grant, which was thus implied, extended to a bare easement without the privilege of taking timber, stone or earth either from the right of way or from lands adjacent thereto.

The contention by appellee and the construction of the act by the District Court, not only imply a grant by the Act of March 3, 1899, for which no warrant is found in its language, but also ignore the language of the Act of March 3, 1875, from which act they seek to draw by reference the implied grant, or authority to grant, which they read into the Act of 1899.

Turning to Section 5 of the Act of March 3, 1875, it will be seen that the exclusion of the classes of reserved lands which Congress intended to exclude from the operations of that act, is made by a mandatory declaration "that this act *shall not apply* to any lands within the limits of any military, park or Indian Reservation," etc. The exclusion is not made merely by an exception of the reserved lands from the grants, but is made, in unusual phraseology, by a broad declaration that none of the provisions of the act shall have any application whatsoever to lands within the excluded reserves.

The effect of the construction so contended for and declared, is thus not only to imply a grant from an act containing no terms of grant, but also to make the Act of 1899, repeal in part the very provision relied upon to exclude these lands from the operation of the Act of 1875, although it contains no words of repeal.

Even less tenable is the construction by the Circuit Court of Appeals. That court, having held that the forest reserve lands were absolutely excluded from the operation of the Act of 1875 as reserved lands to which the provisions of that act were made nonapplicable by the terms of Section 5, held that the Act of 1899, by vesting the Secretary with authority to approve surveys and plats, when, in his judgment, the public interests would not be injuriously affected thereby, by implication vested him with authority to prescribe conditions for the protection of such interests, upon compliance with which he would approve such surveys and plats. (Rec., 581-2.) The court, however, failed utterly to find any act by which the grantee would acquire any rights in the reserve if its survey and plats *were* approved. *And if the forest reserves are, as held, reservations excluded from the operation of the Act of* 1875, *there was, and is, no law under which a railway company can secure a right of way within the limits of such reservations.*

There appears to have been some vague thought underlying the opinion of the Court of Appeals that, in some way, a right of occupancy of forest reserves by railway companies was authorized by the Act of June 4, 1897, since the court says (218 Fed., 298):

> "Now, referring to the authority expressly conferred upon the Secretary of the Interior by the Act of June 4, 1897, to make rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction, thus delegating to such department a broad scope of regulation touching forest reservations, it would indicate that, when the Act of 1899 was adopted, Congress assumed that the Secretary already had ample power and authority to regulate, by rule and the imposition of proper conditions, the occupation generally of forest reserves, and the special purpose of that act was to

> render the power specific as respects occupation for right of way for railroad purposes; hence, the peculiar wording of the act."

The suggestion that Congress assumed that the Secretary had ample power and authority to regulate, by rule and the imposition of proper conditions, the occupation generally of forest reserves—implies that Congress ignorantly assumed the existence of a power in the Secretary which had, in fact, no existence in law. It proceeds upon the basis that Congress was ignorant with respect to its own previous legislation and the rulings of the courts thereon. *This is true because there was no previous enactment authorizing any general occupancy of forest reserves.* That a construction which can have, as its only foundation, an assumption of ignorance of the law upon the part of the legislative body, is untenable, goes without saying.

> 2 Lewis' Sutherland's Statutory Construction (2nd Ed.), Secs. 355, 447.

Nor is there the slightest reason to infer from the provision in the Act of 1897, referred to by the Court of Appeals, that Congress had in mind any general occupancy of such reservation. The provision referred to by the court reads as follows:

> "The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations * * * and he may make such rules and regulations and establish such reserves as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction * * *." (30 Stat., 35; 7 Fed. Stats. Ann., 312.)

By Sections 18 and 19 of the Act of March 3, 1891, *supra*, by which the system of creating forest reservations by executive proclamation was initiated, there was, as we have seen, a grant of right of way within forest re-

serves to canal and ditch companies. By the Act approved May 14, 1896, *supra,* Congress had authorized the Secretary of the Interior to permit the use of rights of way within forest reserves for the purposes of generating, manufacturing or distributing electric power. The Act of June 4, 1897, *supra,* itself provided for the occupancy and use of lands in forest reserves, as follows:

> "It is not the purpose or intent of these provisions, or of the act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.
>
> For the purpose of preserving the living and growing timber and promoting the young growth on forest reservations the Secretary of the Interior, under such rules and regulations as he shall prescribe, may cause to be designated and appraised so much of the dead, matured, or large growth of trees found upon such forest reservations, as may be compatible with the utilization of the forests thereon, and may sell the same for not less than the appraised value in such quantities to each purchaser as he shall prescribe, to be used in the state or territory in which such timber reservation may be situated, respectively, but not for export therefrom. * * *
>
> The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by *bona fide* settlers, miners, residents and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes, as may be needed by such persons for such business.
>
> Nothing herein shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of such reservations, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes, and to utilize their property under such rules and regulations as may be prescribed by the Secretary of the Interior. Nor

shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: Provided, that such persons comply with the rules and regulations covering such forest reservations.

The settlers residing within the exterior boundaries of such forest reservations, or in the vicinity thereof, may maintain schools and churches within such reservation, and for that purpose may occupy any part of the said forest reservation, not exceeding two acres for each schoolhouse and one acre for a church.

All waters on such reservations may be used for domestic, mining, milling or irrigation purposes, under the laws of the state wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder.

Any mineral lands in any forest reservation which have been, or which may be, shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained." (30 Stat., 34-36; 7 Fed. Stats. Ann., 312-315.)

Ample reason for the provision authorizing the Secretary to "make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction," is found in these provisions authorizing the use and occupancy of the forest reserves for the special purposes named, without implying from that clause any general power upon the part of the Secretary to permit the use and occupancy of the forest for every purpose, including the construction and operation of railways. The very enumeration of the purposes for which such use and occupancy was authorized—and which enumeration did

not include use and occupancy for railway purposes, a use and occupancy expressly excluded, according to the holding of the court, by Section 5 of the Act of 1875,—is conclusive that *these provisions* were not intended to authorize the Secretary to permit the use or occupancy of the forest or to grant a right of way therein for railway purposes; and the construction of the Act of 1899 by the Court of Appeals, which forced it to assume that Congress ignorantly supposed these provisions authorized the Secretary to permit the use of the forest reserves for railway purposes, is untenable.

We are not surprised that the District Court, in view of its construction of Section 5 of the Act of 1875, as excluding the forest reserves from the operations of that act, was led to declare, with respect to the Act of March 3, 1899, that "the language of this remarkable provision is truly cryptic in its obscurity" (207 Fed., 170), or that it put forward the construction which it finally adopted with evident doubt as to the correctness thereof. (Rec., 146-149.) Nor are we surprised that the Court of Appeals, in the light of its own construction, declared with respect to the Act of 1899 (218 Fed., 297): "It is somewhat obscure, and just what Congress intended to accomplish by its adoption is not readily apparent." (Rec., 581.)

As construed by the Court of Appeals, it was an enactment absolutely and utterly futile.

(b) *The Act of* 1899 *is supplemental to, and amendatory of, the Act of* 1875, *and is declaratory of the understanding and intention of Congress that forest reservations are not within the class of reserves excluded from the Act of* 1875 *by Section* 5 *thereof.*

But while the Act of 1899 is "cryptic" in its obscurity and without apparent purpose if the forest reserves are excluded from the operations of the Act of 1875 under

the provisions of Section 5 thereof, the difficulties in its construction at once disappear if Congress understood and intended that the Act of 1875 was operative within the limits of these reserves. Its purpose then becomes clear, and the language used apt and appropriate to the declaration of that purpose.

Section 4 of the Act of March 3, 1875 had provided:

> "That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, *if the same be upon surveyed lands*, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the Register of the Land Office of the District where such land is located, a profile of its road; and, upon approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass, shall be disposed of subject to such right of way."

Construing this section, the Interior Department held that it provided for approval of maps upon surveyed lands, but required no filing or approval of such maps prior to survey; that any regulation of the department requiring or providing for the filing of maps over unsurveyed lands, must be held to operate for purposes of information merely. (*Utah & Wyo. R. R. Co.*, 1 L. D., 397.)

This ruling was followed in the regulations for the acquisition of rights of way under the Act of 1875, issued November 4, 1898. Rule 17 provided:

> "Maps or plats of lines of route or station grounds, lying wholly on unsurveyed lands, may be received and placed on file in the General Land Office and the Local Land Office of the District in which the same is situated, for general information, and the date of filing will be noted thereon; but the same will not be submitted to, nor approved by, the Secretary of the Interior, as the act makes no provi-

sion for the approval of any but maps showing the location in connection with the public surveys." (27 L. D., 663, 667.)

The context of the Act of March 3, 1899, requires that, so far as the railway rights of way were concerned, it should be read in connection with Section 4 of the Act of 1875. That is the only general act granting rights of way over public lands, and Section 4 contains the only provision for filing or approval of surveys and plats of location. And when, in the Act of 1899, Congress enacted that "in the form provided by existing law, the Secretary of the Interior may file and approve surveys and plats of any right of way for a * * * railroad * * * over and across any forest reservation or reservoir site," it clearly referred to this provision of the Act of 1875.

Reading the provisions of the Act of March 3, 1899, into Section 4 of the Act of 1875, as we clearly must, it amends the section as it had theretofore been construed by the Interior Department, by clearly authorizing the acquisition of rights of way *across forest reserves,* in advance of construction, by the filing and approval of the plats, whether the lands were surveyed or unsurveyed, and it was then a well known fact that the greater part of the Forest Reserves were in *unsurveyed lands.* This purpose, one not in itself of much importance, further explains the parenthetical character of the enactment.

But as the provision for approval of maps of right of way surveys across forest reserves would be futile if there were no provision for the acquisition of railway rights of way therein, the enactment clearly embodies a declaration by Congress that there was existing law under which they could be acquired, and as the Act of 1875 was the only act under which, by any construction, it

could be held that such rights of way were authorized. the Act of 1899 amounted to a Congressional declaration that the reservations excluded from that act by the provisions of Section 5 thereof, did not embrace forest reserves. This Congressional declaration and construction conform to the long-continued policy of aiding in railway construction by the granting of rights of way. It explains the failure of Congress to provide for railway rights of way across forest reserves, a failure otherwise utterly unintelligible in view of the numerous acts granting rights of way in such reserves for canals, reservoirs, electric lines, ditches, flumes, etc., purely local in character and of far less public importance than railways. It is consistent with, and the only construction by which, the provisions of the Act of 1875, and those of the Act of March 3, 1899, can be harmonized. And this interpretation of the law, by the law-making body, made long prior to the acts charged in the bill, is controlling.

The Court of Appeals attempts to support its construction of Section 5 of the Act of 1875, making it include forest reserves, by reference to certain special acts of Congress passed for the purpose of granting rights of way to certain railway companies across forest reserves.

Act of May 28, 1896 (29 Stat., 190).
Act of June 6, 1896 (29 Stat., 253).
Act of May 18, 1898 (30 Stat., 418).
Act of July 8, 1898 (30 Stat., 729).
Act of Jan. 10, 1899 (30 Stat., 783).
Act of Feb. 28, 1899 (30 Stat., 910).

To the acts thus cited may be added that of June 27, 1898 (30 Stat., 493).

Referring to these enactments, the court says:

> "It must have been the view of Congress that, without these enabling acts, a railroad company had no right, under the Act of 1875, to cross forest reserves; otherwise, there was no need of their enactment." (Rec., 573-4.)

We submit that but little or no weight can be given to these enactments as a legislative interpretation of the Act of 1875. They were all private and special. Such laws are usually framed by the parties desiring them and are passed, upon a favorable committee report, with but little consideration by Congress itself. That body, upon receiving a bill with a favorable report—where the bill did not apparently injuriously affect public interests and where it was in harmony, as here, with the public policy—would not refuse to pass the act merely because the grantee could secure the privileges conferred by compliance with an existing general act. Such acts, therefore, represent the views of those seeking them or their desire to avoid difficulties in the Interior Department by an erroneous construction of the general law, rather than the views of Congress as to the proper interpretation of that law. That is made clear by the fact that these special acts were passed *subsequently*, as well as prior, to the passage of the Act of March 3, 1899.

See Act of Feb. 25, 1903 (32 Stat., 907), granting the Central Arizona Railway Company a right of way for railroad purposes through the San Francisco Mountains Forest Reserve.

(5) *The order of withdrawal of March 21st*, 1905.

We have not undertaken in the foregoing, to distinguish between the withdrawal of March 21st, 1905, and the forest reservation created by proclamation November 6th, 1906, after appellant had identified itself as a grantee under the Act of 1875. If the views thus expressed are sound, the existence of neither the withdrawal, nor the reserve, prevented the attachment of the grants made by the Act of 1875 to the right of way selected by appellant or furnished any grounds for requiring it to agree to the conditions embodied in the stipu-

lation which the decree compels it to sign. There is, however, a distinction between the withdrawal and the reserve; and, even if we should concede that the reservation when created was within the exceptions made by Section 5 of the Act of 1875, it by no means follows that the withdrawal would also operate to except the land from that grant.

(a) *The withdrawal did not create a reservation similar in character to a military, park or Indian reservation.*

The withdrawal was, by its terms, temporary in character:

> "I hereby *temporarily* withdraw from all disposal." (Rec., 184.)

It was only to remain in force, according to the admitted allegations of the bill, "pending a decision of the President as to the advisability of creating a national forest thereof." (Rec., 6.) The distinction between such a withdrawal and a reservation of the character specified in the Act of 1875, is manifest, and has been for many years recognized and applied by the Interior Department. Congress having authorized the selection of indemnity in lieu of school lands, where such lands "are mineral land, or are included within any Indian, military or other reservation," the Department held that a temporary withdrawal of lands, in contemplation of the creation of a forest reserve, did not entitle the grantee to indemnity. The Secretary of the Interior, rejecting the application for such indemnity, said:

> "These temporary withdrawals, made preliminary to the establishment of a forest reserve, are, from the nature of things, largely in excess of the land which may be finally set apart as a forest reservation, and examination thereof is made as fast as possible with the force available for the purpose. The withdrawal made October 14, 1902, your office letter reports, includes, approximately 100 town-

ships, or 2,304,000 acres. While lands so withdrawn are not subject to disposition under the general land laws, yet they are not within a 'reservation,' within the meaning of that term as employed in the Act of February 28, 1891, *supra;* nor are they within a 'reservation' within the meaning of the term as there employed until reserved by the proclamation finally establishing the forest reservation. The Act of 1891 provides indemnity where the school sections so granted 'are mineral land' and also are included within any Indian, military, or 'other reservation.' Indian and military reservations include lands specifically appropriated to a particular use, and the words 'other reservation,' as employed in the Act of 1891, must signify a reservation of like character to those specifically enumerated. Mere temporary or preliminary withdrawal of lands with a view to their investigation and examination to determine what part, if any, should be included within a forest reservation, cannot be construed as placing such lands within a reservation of like character to an Indian or military reservation."

State of Calif, 32 L. D., 346, 347.

And see:

Cora E. Whittaker, 33 L. D., 355.

L. C. Howell, 39 L. D., 92, 93.

(b) *The withdrawal was void because prohibited by law.*

In *United States* v. *Mid-West Oil Co.,* 236 U. S., 459, it was held that the Executive Department had power, without special authorization from Congress, to withdraw lands from the operation of the general land laws. This determination, however, was based upon the long-continued acquiescence by Congress in the exercise of such power, and nothing in the opinion suggests that such power does or can exist when its exercise has been expressly or impliedly prohibited. And a review of the enactments with respect to forest reserves, shows that temporary orders of withdrawal, made in anticipation

of the creation of a forest reserve by proclamation, are prohibited.

First. The Act of March 3, 1891 (26 Stat., 1095), authorizing the creation of forest reserves by order of the President of the United States, coupled with the grant of authority a direction as to the mode in which it should be exercised:

> "The President shall, by public proclamation, declare the establishment of such reservation and the limits thereof."

By the Act of June 4, 1897 (30 Stat., 35) Congress further limited, by express provision, the purposes for which a forest reserve could be created, as follows:

> "No public forest reservation can be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States."

These limitations prohibit the temporary withdrawal of lands pending a determination as to whether a forest reserve shall be created. The positive declaration against such creation except for the express purposes named, is inconsistent with a purpose to permit the executive officers, by official ukase, to withhold at will vast sections of the public domain from settlement and entry for another purpose, namely, to permit such officials to determine, at their leisure, as to whether they shall include such areas within a forest reserve to be thereafter created.

Second. The Act of 1897 (30 Stat., 36; 7 Fed. Stats. Ann., 314), provides:

> "That in cases in which a tract covered by an *unperfected bona fide claim*, or by a patent, is included within the limits of a public forest reservation, *the settler* or owner thereof may, if he desires to do so, relinquish the tract to the Government and may select in lieu thereof a tract of vacant land

> open to settlement not exceeding in area the tract covered by his claim or patent * * *."

This provision, recognizing and protecting settlement claims in existence at the date of the creation of the forest reserve by the President's proclamation, clearly indicates that it was the purpose of Congress that the lands should remain open to settlement and to the initiation of the rights thus protected, until the reserve was created. In this particular the act is identical in character with the railway land grants. Such grants uniformly provided for the protection of homestead settlements and pre-emption claims which had attached to the lands within the boundaries of the grants at the date the same were defined by the definite location of the line. And this court, construing these provisions, which are substantially identical in character with the indemnity provision in the Act of 1897, above quoted, has repeatedly held that by necessary implication, they prohibited executive withdrawals of the lands for the benefit of the railway companies prior to the time the definite location of the road was fixed.

> *Hewitt* v. *Schultz*, 180 U. S., 139, 144 *et seq.*
> *Nelson* v. *No. Pac. Ry. Co.*, 188 U. S., 108, 115 *et seq.*
> *Sjoli* v. *Dreschel*, 199 U. S., 564, 566.
> *No. Pac. R. R. Co.* v. *Sanders*, 166 U. S., 620, 636.

These cases arose under the Northern Pacific land grant, and as references are made in the opinions to the sixth section of that act, it might be inferred that the provisions in that section controlled the decisions.

Brandon v. *Ard*, 211 U. S., 11, 21, however, makes it clear that the rulings were not based upon provisions peculiar to the Northern Pacific Act, but upon the conclusion that inasmuch as the acts granted indemnity in lieu of lands sold or to which the right of pre-emption or home-

stead settlement had attached, or which had been reserved by the United States when the line of the road was definitely fixed, Congress intended that the lands should remain open to such disposition until that time, and that withdrawals of the lands in advance thereof were, by necessary implication, prohibited.

As the provisions in the railway land grant acts, thus construed, are, in principle, identical with the provision found in the Act of 1897 for the protection of settlement claims within forest reserves, the rule of construction adopted in the land grant cases must be applied here, and, pursuant thereto, it must be held that the Act of 1897, by necessary implication, prohibited withdrawals in advance of the creation of the reservation.

As, for the foregoing reasons, the withdrawal order was entirely without effect upon the acquisition of rights in and to the withdrawn lands under the Act of 1875, further consideration of such order is unnecessary.

The order of withdrawal being ineffective to prevent the acquisition of rights in the lands withdrawn under the Act of March 3, 1875, the Railway Company having identified itself as a grantee under that Act February 17th, 1906, by filing with the Secretary of the Interior a certified copy of its articles of incorporation and due proofs of its organization thereunder, and there being no exception in the Act of 1875 under which the subsequently created forest reserve could be permitted to cut off the rights to which the Railway Company had become entitled as such grantee, it follows that when the right of way was located and identified, whether by maps or by actual construction, the Railway Company took title thereto as of a date not later than February 17th, 1906. The title with which it was thus vested, was that granted by the Act of March 3, 1875, and included the timber and material thereon.

Rio Grande Ry. v. *Stringham,* 239 U. S., 44, 47.

There can, therefore, be no recovery by the United States for the timber cut upon the right of way.

Not only is the conclusion that the appellant was vested with the title to its right of way through this forest reserve under the Act of 1875, fatal to the claim of appellee for timber cut upon the right of way and for all damages claimed from acts lawfully performed in the construction of the railroad, but it is also, as we shall hereafter point out, fatal to the claim of appellee to any specific performance of the alleged agreement signed by Mr. Peck, since it is destructive of all consideration for that agreement.

(6) *The right of way was excepted from the Forest Reserve by the terms of the proclamation creating the same.*

Not only was the right of appellant to the right of way within the forest reserve prior to the creation of the reserve, and, therefore, preserved by operation of law as against the reservation, for the reasons hereinbefore set forth, but it was also excepted from the reservation by the very terms of the President's proclamation of November 6, 1906, creating the reserve which contained the following clause:

> "This proclamation will not take effect upon any lands withdrawn or reserved, at this date, from settlement, entry or other appropriation, for any purpose other than forest uses, *or which may be covered by any prior valid claim, so long as the withdrawal reservation, or claim exists.*" (Rec., 197.)

We have seen that prior to the date of this proclamation, the appellant had identified itself as a grantee under the Act of March 3, 1875, by filing its articles of incorporation and due proofs of its organization thereunder. By its amended articles which were transmitted to, and received by, the Commissioner of the General Land Office, prior to the date of the proclamation, it had

specified the route of its proposed road as running "from a point upon the boundary line between the States of Idaho and Montana, near Mile Post No. 141 of the survey of said boundary line; thence extending in a westerly direction through Shoshone and Kootenai Counties and the Coeur d'Alene Indian Reservation to some convenient point to be located on the west boundary of the State of Idaho within the limits of said reservation." (Rec., 189.) It had, October 23rd, 1906, and prior to the date of the proclamation, filed maps of its proposed location in the Land Office of Coeur d'Alene, which maps were immediately transmitted to the General Land Office. (Rec., 191, 196.) As this was two weeks prior to the proclamation, it is certain that these maps had been received in the General Land Office before the proclamation was made.

As appellant had, by identifying itself as a grantee under the Act of March 3, 1875, become vested with the right to enter upon the lands afterwards included within the forest reserve for the purpose of constructing its road and taking material of earth, stone and timber from the adjacent lands therefor, and as it had specified a route which traversed the forest reserve, it had a valid claim to a right of way within the reservation, prior to the date of the proclamation, which was within the letter and spirit of the exception made therein for protection of existing valid claims.

Point II.

THE CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE DECREE ENTERED BY THE DISTRICT COURT FOR THE RECOVERY OF DAMAGES CAUSED BY DEPOSITING DEBRIS IN STREAMS.

The bill, charged that appellant has

> "thrown, rolled and deposited and is throwing, rolling and depositing great quantities of rock, earth,

gravel and debris in the Saint Joseph River in divers places and adjacent to said pretended right of way, whereby said Saint Joseph River has been and is obstructed and rendered wholly unfit and useless for purposes of navigation and log-driving, and will continue to be unfit and useless for purposes of navigation and log-driving until said rock, earth, gravel and debris is removed therefrom." (Rec., 29.)

It prayed that appellant be required "to cease and refrain from obstructing or continuing to obstruct the navigability of the Saint Joseph River" (Rec., 35); and that "plaintiffs may be accorded their damages." (Rec., 36.) These were the sole references to this matter. Appellant excepted to this allegation (Rec., 57, 519, 595); and also demurred thereto upon the grounds: (1) That the complainant had no interest in said matter; (2) that defendant was not answerable as to such matters to complainant, but to the State of Idaho; (3) that the complainant was not entitled to relief with respect to such matter. (Rec., 49-50.)

This demurrer having been overruled, it answered denying the allegation and alleging affirmatively that the river was a waterway wholly within the State of Idaho; that it was not navigable water of the United States, and that all of that portion of the river described in the bill was a swift mountain stream wholly unfit and useless for navigation.

The testimony introduced by the government (the appellant offered none upon this point) established that there were no obstructions placed in the Saint Joseph River itself, but that in the course of construction, rock and earth were thrown from the right of way into the *North Fork* of the Saint Joseph and into some of the tributaries of the North Fork, resulting in obstructions at various places, which were sufficient to interfere with the use of these small streams for log-driving purposes. (Rec., 262-5, 294, 299, 302-6, 308-10, 313-4, 318-9.)

This testimony further established that they were all small mountain streams, the largest of which (the North Fork) was navigable only for logs and small boats (Rec., 262, 272-3, 291, 294-5, 311-12, 315, 318, 324), and even this could not be driven for the greater portion of the year without splash dams. (Rec., 273, 312.) The tributaries of the North Fork could not be driven without splash dams, or other improvements. (Rec., 278-9, 335.)

Hamilton and Warner, testified to estimates of the cost of removing this debris, Hamilton estimating the cost at $4,100 (Rec., 296-9), and Warner at $3,500. (Rec., 313-4.) These estimates appear to have been carefully made, and were arrived at by figuring separately on the cost of removing each obstruction. A third witness, Seery, made a lump estimate of a total cost of $10,000, and added, "That would be a very rough estimate." (Rec., 336.)

All of the testimony as to the obstructions was given subject to appellant's objection that it was irrelevant and immaterial under the issues, was incompetent to prove any of the issues, and because damages of this character were properly the subject of an action at law and afforded no ground for equitable relief. (Rec., 262, 265, 291, 294, 300-1.) The trial court did not pass upon these objections, although assigned in the specification of objections (Rec., 104, 106, 107, 112), but awarded complainant $5,500 on account of stream obstructions. (Rec., 168.)

In all of these proceedings the court erred; and, regardless of other matters in the case, this item should be stricken from the judgment.

The claim on account of stream obstructions is totally disconnected from every other matter presented by the bill. It is not referred to in the stipulation which appellee demanded that appellant execute, nor in that which the court has embodied in the decree. And, in consider-

ing the sufficiency of the pleading as against the demurrer, and of the evidence as against the objections, to support this item of the money judgment, this part of respondent's claim must be considered as an independent cause of action.

(a) *Disregarding all claims of right in appellant to construct its railway in the National Forest and assuming that it was and is a trespasser, the bill is insufficient to support any decree or judgment on this matter.*

The bill does not allege that the streams obstructed are navigable waters of the United States and the evidence clearly establishes that they are not.

Leovy v. *U. S.*, 177 U. S., 621, 627, *et seq.*
U. S. v. *Rio Grande I. Co.*, 174 U. S., 690, 698-9.

Therefore, no question of a violation of any federal statute for the protection of navigation is involved. The utmost that can be claimed is that they are floatable streams, and as such public highways of Idaho for the transportation of logs. This being so, their obstruction is a nuisance at common law and under the laws of Idaho, which provide:

> "Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, stream, canal, or basin, or any public park, square, street or highway, is a nuisance." (Sec. 3656, Idaho Rev. Code.)
>
> "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the nuisance or damage inflicted on individuals may be unequal." (Sec. 3657, Idaho Rev. Code.)
>
> "A private person may maintain an action for a public nuisance if it is especially injurious to him-

self, but not otherwise." (Sec. 3665, Idaho Rev. Code.)

"A public nuisance may be abated by any public body or officer authorized thereto by law." (Sec. 3666, Idaho Rev. Code.)

"Anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property, is a nuisance and the subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance. And by the judgment the nuisance may be enjoined or abated as well as damages recovered." (Sec. 4529, Idaho Rev. Stats.)

This nuisance, if nuisance it is, being public, can be abated only by the public authorities thereto authorized, or at the instance of a private person to whom it is especially injurious. With respect to it appellant occupies the position of a private person. While the United States is the supreme government, its interest in small streams, such as are here involved, within the limits of a state sovereignty (at least, in the absence of special legislation) is not different from that of other land owners; and its rights to maintain an action on account of the obstruction thereof are not greater than would be the rights of a private individual, if he were the owner of the lands within the forest reservation.

U. S. v. *Oil Co.*, 232 Fed., 619, 631.

Mountain Copper Co. v. *U. S.* (C. C. A.), 142 Fed. Rep., 625, 629.

C. & D. Canal Co. v. *U. S.* (C. C. A.), 223 Fed. Rep., 926, 929-30.

Pollard's Lessee v. *Hagan*, 3 Howard, 212, 221, 224.

It is necessary then that appellee, in its bill to restrain the alleged nuisance, should allege facts showing special injury to it, and this it fails to do. It does not even allege directly that the Government owns lands abutting

upon the stream; it does not allege that the streams are navigable, or would be useful for any purpose of navigation or log-driving, if not obstructed; or that complainant owns any timber which would be transported by means of the streams; or that it has ever attempted to use or expects to use the streams for any purpose; there is not even a suggestion of any special injury to complainant of any kind. The absence of such allegations is fatal to the right to relief against a nuisance of this nature, either at law or in equity.

> "In case of public nuisance, the plaintiff must aver special damages to him, inasmuch as the law does not presume or imply damage to any particular individual from the public offense."
>
> 2 Sutherland on Damages (3rd Ed.), Sec. 421, p. 1167.

> "The plaintiff must suffer some special damage beyond that which is suffered in common to the public. This may be direct or consequential, and must be specially alleged."
>
> 4 Sutherland on Damages (3rd Ed.), Sec. 1058, pp. 3089-90.

And see

Joyce on Nuisances, Sec. 429.

Jarvis v. *S. C. V. R. Co. et al.*, 52 Calif., 438, 440.

Spooner v. *McConnell*, Fed. Cas. No. 13,245; 22 Fed. Cas., pp. 939, 947.

Ala. S. R. N. Co. v. *Ga. P. R. Co.* (Ala.), 6 So. Rep., 73, 74.

Innis v. *Cedar Rapids, etc., Ry. Co.* (Ia.), 40 N. W. Rep., 701.

Brennan v. *Lammers* (Minn.), 48 N. W. Rep., 766.

Clark v. *C. & N. W. R. Co.* (Wis.), 36 N. W. Rep., 326, 328.

S. C. S. Co. v. *S. C. R. Co.* (S. C.), 4 L. R. A., 209, 210, *et seq.*

S. C. S. Co. v. *W. C. A. R. Co.* (S. C.), 33 L. R. A., 541, 544-5.

Jones v *St. Paul, etc., Ry. Co.*, 16 Wash., 25, 27, *et seq.*

And see

Note in 59 L. R. A., p. 81, *et seq.*

(b) *The bill is insufficient to support a judgment for money damages for no damages are alleged.*

2 Sutherland on Damages (3rd Ed.), Sec. 421, p. 1167.

4 Sutherland on Damages (3rd Ed.), Sec. 1060.

(c) *There being no allegation of damages, and the court having refused to grant the injunctive relief asked, it was without jurisdiction to award money damages as compensation for the alleged injury.*

As the question of jurisdiction to award money damages in this proceeding in equity, arises not only with respect to this alleged nuisance, but also upon those portions of the decree awarding damages for timber burned and cut, such question will be hereafter considered by itself.

(d) *The amount of damages awarded by the court for this claim is not justified by the evidence.*

Three witnesses testified upon this point, two in careful detail as to the cost of removing the obstructions, the one fixing it at $3,500, the other at $4,100, the third witness, who stated that his was a rough estimate only, at $10,000. The amount awarded upon this account, $5,500, bears internal evidence that the plan pursued in arriving thereat was that which courts have uniformly condemned when pursued by juries, namely, an addition of the three estimates and a division thereof by three, with a slight reduction so as to make the total amount even hundreds of dollars.

Point III.

THE CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE DECREE ENTERED BY THE DISTRICT COURT FOR THE RECOVERY OF DAMAGES CAUSED BY THE DESTRUCTION OF TIMBER BY FIRE.

The bill, after charging various matters with respect to the withdrawal and reservation of the lands, the filing of maps by the railway company, the alleged agreement of Mr. Peck, the demand that defendant execute the stipulation attached to the bill as Exhibit "G," its refusal, and the consequent rejection by the Interior Department of the map of location filed, charges acts by appellant alleged to be wrongful, as follows: (a) The wrongful cutting of timber; (b) the depositing of debris in the St. Joe River; (c) that through lack of proper precautions numerous fires were set out, thereby burning a large amount of mature and seedling timber.

The prayer of the bill is (1st) that the defendant be required to execute and file the stipulation Exhibit "G"; (2nd) that it cease and refrain from obstructing the St. Joe River, and that it be ordered to cease from repeating the alleged wrongs and injuries and from cutting, or causing to be cut, any timber, and from constructing or operating its railway within the forest reserve

> *"until it shall have executed and filed with the Secretary of the Interior the said required stipulation and until it shall have complied with the laws of the plaintiffs and its said so-called amended map shall have been approved by the Secretary of the Interior";*

(3rd)—*and in the alternative*—that it be perpetually enjoined from continuing the alleged wrongful acts of cutting timber and constructing or operating its railway within the forest; and (4th) that the plaintiffs be accorded their damages. (Rec., 35-6.)

The bill thus divides the wrongs complained of into four distinct heads: (1) The refusal to sign the stipulation; (2) the destruction of timber by cutting; (3) the destruction of timber by fire; and (4) the depositing of obstructions in the river.

The trial court awarded respondent $12,000 on account of mature timber and $24,000 on account of immature timber, destroyed by fire.

As seen, the claim made because of stream obstruction had no connection with any part of the case alleged in the bill beyond the mere fact that such obstructions were made during the work upon the railway. The claim for timber burned was also a separate and distinct cause of action. It, like the nuisance claim, was based upon alleged tortious acts, viz: negligence in setting fires.

(a) *There was no equity in complainant's claim for damages for timber burned.*

Appellant demurred to so much of complainant's bill as set out a claim for damages for timber burned, upon the ground that there was no equity in such matter, that as to such claim complainant had an adequate remedy at law. (Rec., 50-51.)

It further interposed timely objections upon the same grounds to the testimony offered with respect to this claim. (Rec., 266, 300-1, 354, 362, 363.)

As there was no claim that the fires were started wantonly or intentionally, or that the Railway Company proposed to set out any other fires, or to permit them to be set out, there was no basis for injunctive relief so far as the fires were concerned, and this portion of the case presented a claim for damages pure and simple. It therefore afforded no basis for an appeal to the jurisdiction of a court of equity.

U. S. v. *Bitter Root Dev. Co.* (C. C. A.), 133 Fed. Rep., 274, 278-280.

U. S. v. *Bitter Root Dev. Co.*, 200 U. S., 451, 471, *et seq.*

So much of the decree as awards the respondent $12,000 on account of mature timber burned and $24,000 for immature timber destroyed by fire, is therefore erroneous.

(b) *The testimony offered as to the amount of timber burned was incompetent and the objections thereto should have been sustained.*

The only witness testifying as to the amount of mature timber burned was Mr. Seery, whose testimony appears at pages 326-339. He did not see the fires, but in September, 1908, cruised the burned district in conjunction with a Mr. Baker, whom the evidence tends to show was employed by the railway company. Mr. Seery nowhere testified directly to the quantity of timber which this cruise showed to have been burned, and his estimate of the quantity, which is made the basis of that part of the decree awarding $12,000 on this account, appears only in a report made by him to the Government, October 12, 1908, Appellee's Exhibit 35. (Rec., 330-1, 488-495.) This report, Mr. Seery testifies, was prepared in the following manner:

> "A. This paper you hand me is my report, the amount of timber of the various kinds. That report was made October 12, 1908.
>
> Q. Was it made at the time the estimate was made?
>
> A. Yes, I compiled this report every night. I took it first upon a notebook and afterwards when I went in at night I wrote it in, in ink, here. * * * No one assisted me in the preparation of this report, but Mr. Baker had an exact copy of it. We compared it and checked it over. When they were finished, I did deliver a copy of this report to Mr. Day."

Thereupon the report was offered in evidence and its

admission was objected to by appellant on the ground that it was a self-serving statement, incompetent and not properly verified. (Rec., 330.) If this objection is well founded, there was no competent evidence before the court as to the quantity of mature timber burned. That a report made by a subordinate agent to his superior would not ordinarily be competent evidence as against a third party is, of course, clear. The only theory upon which such report could be admitted is that it was in the nature of an original memorandum made upon the ground, in which event, where its accuracy was duly testified to, it would have been admissible; but the testimony of Mr. Seery, above quoted, shows that this was not the case. It was not an original memorandum or book of entry made by the witness, but was a compilation prepared by him from the original memoranda, which he testifies he had made; in this respect it is analogous to ledgers or others books which have been prepared from data entered in different and original books of entry. While the rule of evidence permits the introduction in evidence of a shopkeeper's books or similar books of entry where they have been regularly kept, such evidence is admissible only to the extent required by the impossibility of depending exclusively upon imperfect human memory; and the rule, being in the nature of an exception to the ordinary rules of evidence, does not extend beyond the necessity. It is therefore restricted rigidly to the books of original entry and does not extend to the inclusion of journals, ledgers or other compilations made from such original books. And as the record here offered was a subsequent compilation prepared from the original memoranda, which memoranda were not offered in evidence, the objection thereto was well taken and this exhibit should be stricken from the case.

Fitzgerald v. *McCarty,* 55 Iowa, 702; 8 N. W. Rep., 646.

Woolsey v. *Bohn*, 41 Minn., 235; 42 N. W. Rep., 1022.

Griesheimer v. *Tanenbaum*, 124 N. Y., 650; 26 N. E. Rep., 957.

State v. *N. Y., etc., Co.*, 49 N. J. Law, 392; 8 Atl. Rep., 290.

Watrous v. *Cunningham*, 71 Cal., 30; 11 Pac. Rep., 811, 812.

It is, however, unnecessary to multiply citations upon a proposition so elementary.

It is true that after the introduction of the report as an exhibit Mr. Seery was asked and answered as follows:

"Q. What does your report show to be the amount of the burned timber?

A. The amount of feet board measure of mixed timber comprises white pine, red fir, white fir, tamarack, cedar, hemlock and jack pine, and is 4,045,700 feet." (p. 331.)

It will be noted that the answer to this question is simply a statement as to what appears in the report and possesses no value as independent evidence.

(c) *The court erred in adopting the valuation of* $3 *per thousand for mature timber burned, and in using such valuation as the basis for the damages awarded for such burning.*

The court having held that the railway company was bound by the agreement made by Mr. Peck to enter into a similar stipulation with respect to the Coeur d'Alene National Forest, said:

"If this stipulation or agreement had been entered into in accordance with the Peck memorandum, the defendant would thereby have become obligated to pay to the plaintiff at the rate of $3 per thousand feet, board measure, for usable or merchantable timber cut upon the right of way and upon additional strips referred to in clause 1 of the agreement, and also to pay for any and all damages caused by fires, or otherwise sustained by the plaintiff, by reason of the use and occupation of the National Forest by the

> defendant. *Accordingly, I have adopted* $3 *per thousand* as the proper measure of value for the timber cut *and the mature timber burned,* and, *applying such measure,* I find that the plaintiff is entitled to recover from the defendant $26,989 for timber cut upon the right of way and contiguous lands, and $12,000 on account of mature timber burned." (Rec., 168.)

This distinct statement makes it certain that the item of $12,000 damages for mature timber burned, included in the total recovery of $68,489, is based upon a valuation of $3 per thousand, *adopted because that was the value which it was stipulated should be paid for timber cut,* and that it was not based upon any determination by the court as to what was the market value of the burned timber. The stipulation made for the purpose of securing the right of way through the Helena forest, Exhibit D, attached to the complaint (Rec., 38), provided, in clause 2, that the company would pay for timber *cut* "such lump sum as may be mutually agreed upon, or at the rate of * * * $3 per thousand feet, board measure, for usable or merchantable timber."

Clause 5 of the same section required the company to agree as follows:

> "To pay the United States * * * for any and all damages caused by fires, or otherwise sustained by the United States by reason of the use and occupation of said forest reserve by the company, * * *."

These provisions the court required inserted in the stipulation which it decreed that appellant should execute and deliver to secure the right of way through this forest. (Rec., 171, 173.)

It will be noted that, by these provisions, the valuation of $3 per thousand was limited to the timber *cut;* it did not extend to the timber *burned.* The agreement, if executed, would have bound the company, so far as the timber burned was concerned, to pay the *"damages"*

caused by the fire. This, unquestionably, left the measure of damages to be determined by the ordinary rules of law. This measure would include the market value at the time of the fire of the timber burned. If the parties were unable to agree as to this value, it would unquestionably have to be determined from the testimony of witnesses adduced in a judicial proceeding. There was clearly no thought that the valuation stipulated for timber cut, and which could be fixed with some degree of accuracy since the time of the cutting was approximately known, was to apply to timber which might be burned at different times in the future. And since there was no agreement fixing the value of timber burned, and would have been none even if the stipulation had been signed, the adoption of the value fixed for timber cut, as a basis for the measure of damages for timber burned, was erroneous.

Nor can this action be justified upon any theory that there was no other evidence as to the value of this burned timber. Witnesses had been called upon behalf of both respondent and appellant and had given testimony as to the market value of this timber. (Rec., 257-262, 267-271, 278, 279-283, 289-290, 291, 292-293, 301-302, 384-5, 386-390, 391, 394-398, 399-409, 409-413.)

It was the duty of the court to determine from this evidence what the market value was and to apply this market value to timber burned if any liability therefor in this proceeding, existed. The failure to perform this duty and the adoption of a valuation which nobody pretends was the market value, is fatal to a confirmation of that portion of the decree awarding appellant $12,000 for this item. As we do not conceive it to be the duty of this court to perform the work which the trial court should have done, and determine from a review of all of the testimony what the market value was; and as we be-

lieve that this court should, because of the clear error of the trial court in adopting the $3 per thousand valuation, remand the case for a determination as to the fair, market value, even if there be no other error; and because of the extreme length of this brief, we refrain from a discussion of the testimony as to the market value; but we content ourselves here with saying that the clear preponderance of the evidence shows that the market value of white pine was from $1 to $2 per thousand; that yellow pine was worth not to exceed 50 cents per thousand, and that other timbers had no market value whatsoever, as the cost of manufacturing logs therefrom exceeded the price for which such logs could be sold.

(d) *The evidence offered in behalf of the United States for the purpose of determining the damages from the burning of immature timber was incompetent and inadmissible.*

In addition to the item of $12,000 allowed for mature timber destroyed by fire, the decree awards $24,000 to appellee for immature timber so destroyed. The testimony with reference to the quantity of immature timber is brief. Mr. Seery testified (Rec., 331) that there were 1,344½ acres of mixed seedlings so burned. Mr. Rockwell testified that between July and November, 1909, using maps prepared by Mr. Seery for the purpose of locating a portion of the ground burned over, and having other burned areas pointed out to him by Ranger Kottkey, he examined the burned areas; that he then made a study of the timber in the vicinity, ascertaining what species were growing there, what the rate of growth was, and how much timber an acre of land would produce; that he selected the areas in adjacent unburned timber growing under similar conditions to those found on the burned areas, measured the timber in each area so selected; ascertained thereby how many trees there were,

and the diameter of each species; selected average trees of the various diameters, cut these down, ascertained the number of board feet therein contained, and the age of the tree. He further testified that he determined that the age at which timber of the class and character growing in this vicinity became merchantable was 100 years; that he then estimated the cost of caring for such immature timber until it should reach that age; and deducted this estimate from an estimate of the market value of the timber at the age of 100 years, an estimate based upon an assumption that timber would then have a market value of $4 per thousand stumpage, and discounted the valuation thus obtained to the present time by compound interest tables at 3 per cent. Elaborate tables of valuation obtained in this manner were put in evidence as Government's Exhibits 1A and 3A. The witness further testified to a *second* method of ascertaining the valuation of the immature timber, viz: that he had prepared tables showing the stand of young growth destroyed on the burned areas, together with the total cost to the Government of restoring the same areas to the condition in which they were before the fire occurred. In determining this cost the witness based his conclusions on a cost of $15 per acre for setting out the seedlings and added to this initial cost, interest thereon at 3 per cent. per annum, compounded, for a period necessary to bring such new timber to the age which he estimated the burned timber had arrived at, and added another item of 3 cents per acre per annum for the cost of protection. The tables thus prepared by the witness were introduced in evidence as Exhibits 2A and 4A. (Rec., 351-352.) The introduction of Exhibits 1A and 3A was objected to in so far as they purported to show values, for the reason that they were based upon an incorrect method of arriving at the value of the timber destroyed and for the further reason

that the witness was not shown to be qualified to testify as to values. (Rec., 349, 353.) The introduction of Exhibits 2A and 4A was objected to upon the ground that so far as such exhibits purported to show quantities of timber in the burned areas they were duplicates of Exhibits 1A and 3A; that in so far as they purported to show the cost of restocking and the value of timber arrived at in that manner, they were immaterial, irrelevant and incompetent, that not being a proper method to get at the market value of the young timber destroyed. (See Rec., 351, 354.) These exhibits were further objected to upon the ground that they were incompetent under the issues of this case, as the remedy for such damages, if any, was at law and the court of equity was without jurisdiction. (Rec., 354.)

At the close of Mr. Rockwell's testimony appellant moved to strike it out for the reasons assigned in the various objections interposed and for the further reason that it appeared that in his estimates of the cost he had allowed an unwarrantable rate of interest and had made no allowance for insurance, or the probability that the timber would have been destroyed from other causes, and upon the ground that the testimony was not competent as furnishing any basis for equitable relief. (Rec., 362.)

It was stipulated, subject to the same objections, that Mr. Morris, would, if examined at length, testify to the same facts as Mr. Rockwell. (Rec., 363.) This is all of the testimony adduced by the Government for the purpose of showing the market value of such immature timber, although Mr. Clifford testifies that the cost of procuring and planting seedlings would be approximately $15 per acre and that it would require 5 cents an acre per annum to properly care for and protect such seedlings after being planted (Rec., 366); and Mr. Silcox also gives testimony fixing the cost of caring for such seedlings after

being planted at approximately 3 cents an acre. (Rec., 367.) None of this testimony purported to show the market value of the immature timber.

The foregoing is a resume of all of the testimony given on behalf of the Government upon which the award of damages in the sum of $24,000 for the burning of immature timber is based.

Witnesses for appellant testified that these timber seedlings have no market value. Mr. Douglas saying:

> "When you are buying timber, seedlings are not considered at all. In cruising timber you do not estimate it where it is too small for logs." (Rec., 390.)

This testimony was undisputed.

It will be seen from this review of the evidence that the Government offered no testimony as to the injury to the land or as to the value of the immature timber. In lieu thereof it offered evidence to establish its alleged damages upon two distinct theories: *First*, by deducting from the estimated market value of the timber at its estimated age of maturity the estimated cost of bringing that timber from its estimated age to such estimated age of maturity. *Second*, by the estimated cost of reproducing the timber destroyed. Which theory the court adopted in arriving at its conclusion that the damages by reason of the destruction of the immature timber amounted to $24,000, we do not know. It must have adopted one or the other, for there was no other evidence before it upon which it could base a finding of more than nominal damages. Nor is it material which theory the court adopted, for neither was the proper measure of damages, and the testimony under each was inadmissible. The first method is purely speculative. There is much obscurity as to just how Rockwell and Morris determined the quantity, kind or age of the timber which had been burned the year before they made their investigation. The testimony leaves the impression that they guessed at

it from examination of areas of unburned timber in the vicinity which they assumed was of substantially the same quantity, age and kind. (Rec., 344.) It is certain, however, that they concluded that the age of maturity would be 100 years; that the immature timber in some areas was not to exceed fifteen years of age, requiring eighty-five years to reach maturity, in another area it was ninety years of age, requiring ten years to reach the age of maturity. They *assumed* a market value of $4 per thousand when the timber had reached that age; that is, that in one case timber would be worth that amount 10 years hence, and in another that such would be its value 85 years in the future. This theory further assumes that, but for this fire, the timber would have survived all dangers to which such timber is subject, and would have safely reached the age when it would have become a marketable product—an assumption paralleled only by the case of the maid who figured a fortune from a setting of eggs, but unfortunately stubbed her toe and lost her capital before the motherly hen could begin to set. Deprived, as we are, of all powers of prophecy, we do not know what the market value of logs on the St. Joe and its tributaries will be 85, or even 10, years hence. We do know that in all human probability this particular timber would have been burned in the year 1910 by conflagrations which swept this entire country and for which the Railway Company has never been charged with responsibility.

> "That country was pretty badly swept by fire last fall. The timber is practically all killed." (Testimony of Mr. Gregory, witness for complainant, Rec., 315. See, also, Rec., 358.)

This fire, so great as to amount to a national calamity of which the court will take judicial notice, is stated in the Department of Agriculture Bulletin No. 117, issued October 23, 1912, to have burned over approximately

2,000,000 acres. (*Bulletin,* p. 23.) Its cause is attributed, by forest supervisors and rangers, to lightning. (See article "A WORLD AFIRE," Everybody's Magazine of December, 1910, p. 754.) And that lightning is a prolific cause of forest fires is a well known fact. In Bulletin No. 117 above referred to, it is stated:

> "In the order of their importance, the following are the chief known causes of fires in the National Forests:—Railroads; lightning; campers; brush burning; incendiary; sawmills. Lightning is responsible for about 17.5 per cent. of the fires." p. 9. (See, also, Table of Statistics, p. 10.)

Clearly then, the possibility that a forest of immature timber may never mature, is an important factor to be taken into consideration in determining its value, and in the absence of statistics showing the probabilities of timber surviving to maturity (and it is not claimed that such statistics have ever been compiled), an attempt to arrive at the value of a body of immature timber upon the basis of its value at maturity, is the wildest of speculation. Counting chickens before they are hatched has never been recognized as good business; and it should not be permitted as a proper method of ascertaining damages in judicial proceedings where the period of incubation is from ten to eighty-five years.

The second theory upon which evidence for the purpose of ascertaining the Government's damages sustained by the burning of this immature timber, was introduced, viz.: the cost of reproduction, is scarcely less objectionable. Such cost bears little or no relation to the value.

The true measure of damages where immature timber is destroyed is the difference in value of the land upon which the timber was growing before and after the injury.

Miller v. *Kansas City Southern Ry. Co.* (Mo.), 167 S. W. Rep., 469.

People v. *N. Y. C. & H. R. Co.*, 146 N. Y. Supp., 490.

Dwight v. *Elmira C. & N. R. Co.* (N. Y.), 30 N. E. Rep., 398.

Ribblett v. *Cambria Steel Co.* (Pa.), 96 Atl. Rep., 649, 652.

Bullock v. *B. & O. R. Co.* (Pa.), 84 Atl. Rep., 421, 422.

Mahaffey v. *N. Y. C. & H. R. R. Co.*, (Pa.), 78 Atl. Rep., 143.

Southern Ry. Co. v. *Slade* (Ala.), 68 Southern Rep., 867, 870.

Steckman v. *Q. O. & K. C. R. Co.* (Mo.), 165 S. W. Rep., 1122, 1124.

Chase v. *Hoosac, &c., Co.* (Vt.), 81 Atl. Rep., 236, 237.

Cleveland School Dist. v. *G. N. Ry. Co.* (No. Dak.), 126 N. W. Rep., 995, 996.

S. L. & S. F. Ry. Co. v. *Hoover* (Kans.), 43 Pac. Rep., 854, 856.

C. & O. Ry. Co. v. *Baylor* (Va.), 86 S. E. Rep., 847.

No testimony whatsoever relative to the value of this land, either before or after the fire, was offered in evidence.

In the case of immature annual crops destroyed, some courts have held that the damages sustained are to be determined by evidence as to what the probable yield would have been, from which amount there is deducted the cost of caring for and harvesting the crop. Other courts have held that the measure of damages is to be determined by evidence of the cost of seeding and caring for the crop until it had arrived at the age at which it was destroyed plus the rental value of the land. The first of these methods has been abandoned as improper, even by some courts which originally adopted it. Thus, the Supreme Court of Minnesota says:

"So much of the Lommeland case as justified the

court below on the trial of this, to hold that evidence of events which occurred subsequent to the loss, such as the average product of yield of like crops under similar conditions and within reasonable limitations as to time, and of the future average market value of a matured crop, less the expense of harvesting and marketing, may be received when estimating damages will have to be overruled, and this leads to a reversal of the order appealed from through no fault of the trial court. The radical error in applying the rule warranted by the Lommeland case is made more apparent when we again allude to the fact that, because of it, and for the purpose of estimating his damages (in the fall of the year and within two months after the fire), plaintiff was permitted to show what his prospects ought to be for a crop of grass seed and hay the next summer, what the yield should be, and what, in all probability, the value of the seed and hay would be some ten months in the future, without taking into consideration the fact that the alleged destruction was in the fall of the year, and that a crop of some character and value could be raised on this land in the same growing period, and thus mitigate the injury and loss. An action to recover damages for a partial loss or a complete destruction of growing crops, whether annual or perennial, is practically an action to recover for an injury to real property. In principle, such an action cannot be distinguished from one brought to recover for an injury to growing trees, nor is the measure of damages at all different, although stated differently. * * * Evidence of matters occurring subsequently to the injury is not competent."

Ward v. *C. M. & St. P. Ry. Co.* 61 Minn., 449; 63 N. W. Rep., 1104.

And that this objection applies with much added force to growing timber which will not come to maturity for from ten to eighty-five years, cannot be doubted.

In *Bradley* v. *Iowa Cent. Ry. Co.*, 111 Iowa Rep., 562, 82 N. W. Rep., 996, 997, the court held that the cost of reproduction of growing trees was not a proper meas-

ure of the damages for their destruction. It had previously held that the cost of reproduction of meadows so destroyed was the proper measure of damages for injuries to property of that description. After announcing that the rule with reference to growing orchards was different, the damages in such cases being measured by the difference between the value of the property with the orchard and what it was worth without it, the court said:

> "The reason for the distinction this court has made in the manner of estimating the damages for the destruction of a meadow and those for the destruction of trees—and a hedge is to be considered the same as trees—is this:—The value of the use during the time lost is an important element. This can be accurately ascertained in the case of a meadow, but cannot as to trees or a hedge. How long it will take to get grass in a certain field can be foretold with substantial certainty; how long it will take trees or a hedge to attain a certain size is largely a subject of guess. In any case, it takes so long as to leave too much room for doubtful elements to enter into the calculation."

In *Mahaffey* v. *N. Y. C. & H. R. R. Co.,* 229 Pa., 285; 78 Atl. Rep., 143, the court, rejecting the cost of reforestation as a basis upon which to appraise the damages caused by the destruction of growing timber, said:

> "It was plaintiff's contention that the fire had practically destroyed the reproductive capacity of the land in this regard, and that only as assisted by actual reforestation could it be made to produce. Evidence was admitted to show the cost of such reforestation. If this evidence was intended as a basis for estimating plaintiff's damage, it was all wrong to admit it. The cost of restoring the property to its condition before the fire would not be the correct standard of measurement, but the difference in the market value of the real estate for any purpose to which a purchaser might devote it. We would regard the admission of this evidence as re-

versible error, were we not convinced that it was without prejudice to the defendant."

In *Mattis et al.* v. *St. L. & S. F. Ry. Co.*, 138 Mo. App., 61; 119 S. W. Rep., 998, the court held that the measure of damages for the destruction of the roots of a timothy or blue grass meadow, was the cost of reseeding and loss of rental value for the season lost in that process, but that "for wild grass * * * which is not produced from seed sown, and which, when once destroyed, cannot be restored in a season by the agency of man, a different rule necessarily applies, for the destruction of the roots of such production may be an injury to the land itself, and the damage would be the difference in that value before and after the fire."

In *Cleveland School District* v. *G. N. Ry. Co.*, 20 N. Dak., 124; 126 N. W. Rep., 995, an action to recover damages for the burning of young shade trees, the court charged the jury that the measure of damages was the difference between the actual value of plaintiff's property just before the fire and the actual value of the same property after the fire. The defendant tried the case on the theory that the cost of replacing the trees destroyed was the measure of respondent's damages. The Supreme Court affirmed a judgment in favor of plaintiff, holding that the theory of the defendant was erroneous and that the evidence offered upon such theory was inadmissible.

In *Steckman* v. *Q. O. & K. R. Co.*, 178 Mo. App., 375; 165 S. W. Rep., 1122, the court said:

> "The rule as stated in *Adams* v. *Ry.*, 139 Mo. App., 204, is that where the destruction of the thing includes but a temporary injury to the land, and the thing may be replaced in a comparatively brief period, the true measure of damages is the cost of replacing it, and the rental value of the land until it is replaced, but where the destruction of the thing

> inflicts more than a temporary injury, or the replacement would be impossible or tedious and uncertain, both in cost and result, the criterion is the damage inflicted on the market value of the land. The facts that fruit trees, hedge and blackberry bushes are attached to the soil and depend upon such attachment for life, sustenance and utility, and that when destroyed their replacement is tedious and a thing of uncertainty, both as to cost and result, have led to the rule which classes such things as belonging to the inheritance." (p. 1124.)

Inasmuch as the only evidence offered by complainant tended to show, as a basis for the damages claimed for the destruction of immature timber, the possible value of that timber when it reached the age of maturity, an age ranging from ten to eighty-five years, less the cost of caring for it until that period—a method which, at the outside, could only tend in a remote degree to establish the value of the immature timber as timber—and, in the alternative, the cost of reforestation, and no effort was made to show the difference between the value of the land as it was immediately before, and immediately after, the fire, there was no evidence upon which the court could base a finding as to the damages from this cause; and in the absence of competent evidence as to the damages, the court, if it could make a finding in favor of complainant at all, was restricted to a finding of nominal damages only. The finding of $24,000 as damages for the immature timber destroyed is, therefore, utterly unsupported by any competent evidence.

Before closing this subject, we call the attention of the court to the fact that there are no means by which the court can determine upon which of the two theories of complainant the trial court acted in making its finding. The testimony offered under each theory was objected to as incompetent. The court, however, did not pass upon the objection and did not indicate in its opin-

ion upon what basis it proceeded in allowing this item of $24,000 for the immature timber destroyed, and if one of the theories was correct (we think we have conclusively shown that neither of them was), we are left in the same position in which we would be if the court had given conflicting instructions to a jury, one of which was erroneous, the appellant being thereby prevented from knowing upon which instruction the jury acted. The giving of conflicting instructions is always reversible error, and where the court, trying the case without a jury, has proceeded upon one of two inconsistent theories, without designation of the theory adopted, the same result should follow.

Although these questions were fully argued in the Circuit Court of Appeals they were not considered in its opinion. (218 Fed., 288.)

(e) *The court was without jurisdiction to enter a decree for money damages in the present action.*

This question, with similar questions arising with reference to the money damages for stream obstructions and for timber cut, will be hereafter considered.

We respectfully submit that that portion of the decree awarding the complainant $12,000 damages, on account of mature timber, and $24,000 on account of immature timber, burned, should be vacated and set aside.

Point IV.

THE UNITED STATES CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE DECREE FOR THE RECOVERY OF DAMAGES FOR TIMBER DESTROYED BY CUTTING.

In addition to damages for stream obstructions and for timber destroyed by fire, the appellee asserted in its bill a third distinct claim, for timber cut in clearing the right of way and extra widths which appellee required

appellant to cut. The bill charged that appellant had cut and caused to be cut the timber upon the 200-feet right of way and that it had cut and removed, a large amount of timber upon an additional strip of land above and adjacent to the right of way.

To these allegations demurrers were interposed upon the ground that there was no equity in such matters. (Rec., 51.)

The bill further charged that defendant had cleared and caused to be cleared and is clearing and causing to be cleared, portions of the lands for the purpose of constructing a railroad, and had constructed and caused to be constructed and is constructing and causing to be constructed such railroad; that it had destroyed and caused to be destroyed, and is destroying and causing to be destroyed, large amounts of small timber and young growth through unskilled methods of lumbering. To this portion of the bill the defendant also demurred upon the ground that there was no equity in such matters. (Rec., 51.)

In addition to these allegations, the 11th paragraph of the bill charged that defendant is now trespassing and committing waste upon the National Forest without any authority from the plaintiff. In the 12th paragraph it is further charged that defendant threatens and intends, without executing the demanded stipulation and without awaiting the approval of its map of location and without other authority from the plaintiff, to cut the defendant's timber from the reserved lands and commit other unauthorized acts of trespass and waste; and that unless restrained by injunction, it will do and perform such threats.

It will be noted that by these allegations two things are commingled; the one, acts wrongfully done and completed before the filing of the bill; the other, threatened

waste and trespass. The matter demurred to in the fourth and fifth paragraphs of the demurrer related exclusively to past acts, while that demurred to in the sixth paragraph related in part to past acts and in part to acts being committed at the time the bill was filed.

(a) *Damages for timber cut were not recoverable in this proceeding.*

We may concede, for the purposes of the argument under this point, that if the purpose of the bill had been in good faith to enjoin waste which defendant threatened and unless so restrained would unlawfully commit, a bill on the chancery side of the court for such injunctive relief would have been proper. It conclusively appears, however, that such injunctive relief was not what the plaintiff sought to accomplish by this proceeding. *First,*—The Railway Company began construction within the reserve about July 10, 1907, and completed its work about July 31, 1909. (Rec., 234-5.) The Government was notified that the Peck agreement had been signed under a mistake of fact and that the company objected to signing a stipulation, early in October, 1907. (Rec., 373-375, 379-381.) Formal notice that defendant would not recognize the Peck agreement was given to the United States December 2, 1907. (Rec., 225-229.) The Railway Company continued its work with the full knowledge of the Government (Rec., 226-229, 235-247); and no action was taken by the Government to stop the same until the filing of the bill in the present case, June 23, 1909 (twenty months after such first notice) and about a month prior to the completion of the road *and after all work of clearing must have been completed. Second,*—What the Government sought to accomplish was to compel defendant to execute and file the stipulation, Exhibit G, as a specific performance of the promise

contained in the Peck agreement of May 10, 1907. This is made clear by the prayer for relief which asked that defendant be required to execute this stipulation Exhibit G, and be enjoined "*until it shall have executed and filed with the Secretary of the Interior the said required stipulation and until it shall have complied with the laws of the plaintiffs and its said so-called amended map shall have been approved by the Secretary of the Interior,*" and the alternative character of the further prayers for injunctive relief. The injunctive relief was thus but ancillary to the primary demand for specific performance. It was but an attempt to use a threatened injunction as a whip to compel defendant to enter into the contract embodied in the stipulation. If the defendant would enter into such contract no injunctive relief was desired. This being the situation, the injunctive feature of the bill must stand or fall with the sufficiency of the allegations to support the prayer for specific performance. If the court should hold that plaintiff was not entitled to demand the execution of the stipulation, it could not with grace indirectly compel the execution of such stipulation by enjoining appellant until such time as it had signed it. For these reasons, the injunctive features of the bill were not sufficient upon which to base the equitable jurisdiction of the court.

There being no equity in the injunctive feature of the bill, the attempt to secure a money judgment for the timber cut prior to its filing, is purely and simply an application to the equity court to award damages for an alleged trespass; that a court of equity cannot do this has been decided.

U. S. v. *Bitter Root Dev. Co.*, 200 U. S., 451, 472, *et seq.*

U. S. v. *Bitter Root Dev. Co.* (C. C. A.), 133 Fed. Rep., 274, 278, *et seq.*

For these reasons the court should have sustained the fourth and fifth paragraphs of the demurrer at the least; and should have refused to have included in the money judgment the item of $26,989 awarded for timber cut.

All of the testimony concerning timber cut and the values thereof was given subject to appellant's objection that there was no equity in such matters, and that such evidence was incompetent and immaterial under the issues of the case. It was stipulated that this objection should be considered as going to the testimony of all of the complainant's witnesses. (Rec., 300-301.) This objection was well founded; and the testimony introduced thereover should not be considered.

(b) *There is no competent evidence as to the quantity of timber cut.*

In addition to the general objection referred to there was a special objection to the testimony of Mr. Skeels, who was the only witness called by the Government to testify with respect to the quantity of timber cut. Mr. Skeels testified that he had a report of the cruise made by himself of the timber cut; that his estimate showed the amount of timber cut in the forty-acre subdivisions and the number of trees which they cut over in each forty acres. He further testified:

> "At the close of each day I worked up my notes and entered the data on the map. The report wasn't submitted to my superior in the Forest Service until I had finished my work. This report now before me was in nearly every case made at the close of the day when the estimate was made; *sometimes I might go two or three days before I worked up the data on these maps in my report,* but it would depend a good deal on the way the work went. * * * *In many of these sheets the report or memoranda before me was made the same day as the estimates were made; in other cases it might be a day or two days.*" (Rec., 255.)

During the course of the testimony of the witness repeated objections were made to the use of the memoranda and reports as substantive evidence; that according to the witness' statements the documents which he was asked to read into the record were not his original memoranda but compilations prepared by him therefrom and therefore not admissible as books of original entry; that not being admissible evidence in themselves they could not be gotten into the record by having the witness read them into it. (Rec., 256.)

The witness was then asked to refresh his memory from the memoranda and state the amount of timber of each subdivision prepared by him and to state any independent knowledge that he had. In answer thereto he testified as to the quantity of timber cut from the S. E. ¼ of the S. E. ¼ and the S. W. ¼ of the S. E. ¼ of Section 26, Township 47 North, Range 3 East. Without further questions or testimony by the witness, Exhibits 2 to 33, inclusive, being the compilations prepared from the original memoranda, were read into the record and received in evidence over the same objections on behalf of defendant, namely, that these documents were not the original memoranda and therefore not admissible in evidence. (See Rec., 256, 257.) After Exhibits 2 to 33, inclusive, had been received in evidence, the witness identified a report which he made to the Forester of the Forest Service stating the amount of timber which was cut by defendant on the right of way and adjacent strip and that it was a compilation made from Exhibits 2 to 33, inclusive. This compilation was then offered in evidence and admitted over the appellant's objection to its competency. (Rec., 257.) This is all of the testimony as to the quantity of timber cut. The witness did not testify as to the quantity of timber cut upon any subdivision other than the two forty-acre tracts above referred

to and did not testify as to the aggregate quantity of timber. The entire evidence as to the quantity of timber claimed to have been cut is embodied in the Exhibits 2 to 33, inclusive, and the compilation therefrom, Exhibit 34. If, for the reasons specified in the objections, these exhibits were not properly admissible in evidence, there was and is no testimony before the court as to the quantity of timber cut.

That these exhibits were not the original memoranda made by the witness during his cruise of the quantities of timber cut, is clear. They are statements written up by him at the close of the day, sometimes after the lapse of two or three days, from the notes he had taken during the day. They occupied with respect to such notes, the relation of a ledger to a day book; and that not being the original books of entry, they were not admissible in the absence of the original notes, is elementary law.

Fitzgerald v. *McCarthy* (Ia.), 8 N. W. Rep., 646.

Woolsey v. *Bohn* (Minn.), 42 N. W. Rep., 1022.

Griesheimer v. *Tanenbaum* (N. Y.), 26 N. E. Rep., 957.

State v. *N. Y. & N. J. T. Co.* (N. J.), 8 Atl. Rep., 290.

Watrous v. *Cunningham* (Calif.), 11 Pac. Rep., 811, 812.

It is urged that even though the exhibits might not be admissible themselves, yet the witness could use them to refresh his memory. The difficulty with this is that he did not use them to refresh his memory. It was the exhibits themselves which were put in evidence. If they be stricken as they should be, there is not one word of testimony as to the quantity of timber cut, except on the two forty-acre tracts referred to.

(c) *The court was without jurisdiction to enter a decree for the recovery of money damages for timber cut.*

We shall hereafter discuss more fully and in connection with the similar questions arising with respect to the obstruction of streams and the burning of timber, the question of the jurisdiction of the court, sitting as a court of equity, to enter any decree for the recovery of money in this cause.

We respectfully submit that the trial court erred in awarding any recovery of money for the timber cut.

Point V.

THE UNITED STATES COURT OF APPEALS ERRED IN FAILING TO HOLD THAT THE RESPONDENT WAS NOT ENTITLED TO EQUITABLE RELIEF.

The bill is primarily one for the specific performance of the Peck agreement of May 10, 1907. There is coupled with this a demand for injunctive relief until such time as defendant shall execute the stipulation Exhibit "G."

This demand for injunctive relief is not asked as an independent relief but only as a means of compulsion. Following this portion of the prayer for relief there is a prayer in the alternative for injunctive relief, and, coupled therewith, a further demand for purely legal relief, "that the plaintiffs may be accorded their damages." As the demand for damages affords no basis for invoking the aid of a court of equity, the case must fail on the chancery side of the court unless a case is made for equitable relief in the nature of the specific performance of the Peck agreement, or for injunctive relief.

The sufficiency of the bill was challenged by a demurrer thereto upon the ground that it was without equity and did not set forth any matters entitling complainant to any relief in the chancery court. (Rec., 52.)

(1) *There is no case alleged or made for equitable relief in the nature of specific performance.*

The alleged agreement, specific performance of which is demanded, is that embodied in the paper writing, Exhibit "C" annexed to the bill executed by Mr. Peck May 10, 1907. (Rec., 37.) (See statement of facts.)

This promise of Mr. Peck and qualified acceptance by the Forester, did not constitute an agreement the specific performance of which would be enforced by a court of equity, nor is it aided in this respect by any subsequent proceeding.

(a) *The agreement was for the doing of acts which, under the allegations of the bill, were illegal.*

The bill does not allege any facts showing that appellant was a grantee under the Act of 1875, or charge that appellant ever filed a certified copy of its articles of incorporation or proofs of its organization thereunder with the Secretary of the Interior, and thus fails *in toto* to show that appellant was entitled to any of the benefits of that act. The explanation of this failure to show that appellant was a qualified grantee under the Act of 1875, is found in the theory of the Government that the Act of March 3, 1899, was in itself a granting act under which a railway corporation could secure a grant of a right of way through a forest reserve by the approval by the Secretary of the Interior of its surveys and plats of right of way filed with him, and this regardless of whether it had complied with the Act of March 3, 1875, by filing a copy of its articles of incorporation and proofs of its organization, or not.

The bill being drawn upon this theory and omitting, as it does, allegations showing the acceptance by appellant of the provisions of the Act of March 3, 1875, its sufficiency as against the demurrer interposed must be

determined, in the first instance, upon this basis. If, contrary to the Government's contention, the Act of 1899 does not make a grant or authorize the Secretary of the Interior to make one or give permission to occupy a forest reserve for railway purposes, or, even if the Act of March 3, 1899, does make a grant or authorize the Secretary to give permission to occupy a forest reserve for railway purposes, but restricts such grant or authority to railway companies which have accepted the provisions of the Act of 1875,—the bill was clearly insufficient, for the alleged agreement contemplated the entry into, and the construction of a railway within, the forest reserve by a corporation which, according to the allegations of the bill, had not accepted the provisions of the Act of 1875.

We have, in Point I, fully considered the provisions of the Act of March 3, 1899, and have shown that that act in itself neither made a grant of a right of way, nor authorized the Secretary of the Interior to make such grant, or to give permission to occupy forest reservations for railway purposes.

We have also shown under that point, that the Act of March 3, 1899, was supplemental to, and amendatory of, the Act of March 3, 1875, and a necessary consequence of this relationship between the acts is, that the Act of March 3, 1899, has reference to such railway corporations, and to such only, as, by compliance with the provisions of the Act of March 3, 1875, had identified themselves as grantees under that act.

It follows that, according to the allegations of the bill, appellant was a railway corporation to which no privileges of construction within a forest reserve had been granted, and to which the Secretary had no authority to grant such privileges.

Not only was the Secretary without authority to grant

privileges within a forest reserve to a railway corporation of the class to which, according to the bill, appellant belonged, but the granting of the privileges and the doing of the acts which the writing of May 10, 1907, contemplated, were in direct violation of prohibitions and restrictions contained in the acts of Congress relative to the forest reservations.

According to the writing of May 10, 1907, Mr. Peck agreed, on behalf of the company, that it would "execute and abide by stipulations and conditions to be prescribed by the Forester in respect to said railroad; such stipulations and conditions to be as nearly as practicable like those executed by the company on January 18, 1907, in respect to its railroad within the Helena National Forest, Montana."

For the purpose of avoiding confusion, we desire to note here that, although the writer of this paper apparently considered appellant as the same company that had executed the stipulation with respect to the Helena National Forest, such is not the case. The Helena National Forest stipulation was executed by the Chicago, Milwaukee & St. Paul Railway Company of Montana, a separate and distinct corporation. (Stipulation, Par. 13; Rec., 213-219.)

By this stipulation the company agreed to keep clear of all timber and other inflammable substances, the proposed right of way and all land in the forest reserve lying within 250 feet of its center line, except such land as the Forester should specifically exclude in writing; and to pay for such timber and wood so cut in clearing such right of way, or, to pile such timber and wood as the company did not wish to use or sell, leaving it available for sale by the Forester; in which event, the company was to transport the timber and wood at established freight rates and put in necessary sidetracks for the

handling of the same. The stipulation thus contemplated the cutting and sale of timber within the forest reserve, such sale to be made to the Railway Company if it elected to purchase, at the prices fixed in the stipulation. These provisions were in direct conflict with the Act of June 4, 1897, as amended by the Act of June 6th, 1900. (30 Stat., 35; 31 Stat., 661; 7 Fed. Stats. Ann., 313-14), which provided:

> "For the purpose of preserving the living and growing timber and promoting the younger growth on forest reservations, the Secretary of the Interior, under such rules and regulations as he shall prescribe, may cause to be designated and appraised, so much of the dead, matured, or large growth of trees found upon such forest reservations as may be compatible with the utilization of the forests thereon, and may sell the same for not less than the appraised value, in such quantities to each purchaser as he shall prescribe, to be used in the state or territory in which such timber reservation may be situated, respectively, but not for export therefrom. *Before such sale shall take place, notice thereof shall be given by the Commissioner of the General Land Office, for not less than thirty days, by publication in one or more newspapers of general circulation, as he may deem necessary, in the state or territory where such reservation exists;* Provided, however, that in cases of unusual emergency, the Secretary of the Interior may, in the exercise of his discretion, permit the purchase of timber and cord wood in advance of advertisement of sale at rates of value approved by him and subject to payment of the full amount of the highest bid resulting from the usual advertisement of sale. * * *"

These provisions, by which the Secretary, for the purposes and under the limitations named, was authorized to sell timber from the forest reserves, prohibited a sale by him of such timber for other purposes or in disregard of such conditions. The stipulation which contemplated a sale to the Railway Company, without ad-

vertisement and at a fixed price, of all of the timber cut upon the right of way and extra widths, was in direct violation of this limitation, even as the use and occupation of the reserve for railway purposes was in violation of the implied limitations contained in the Act of 1897, authorizing the Secretary to permit such use and occupation for certain specified purposes only. And unless the authority of the Secretary to make such agreement with the Railway Company as the stipulation contemplated can be found in some other act of Congress, the proposed stipulation was void because illegal and prohibited by the Congressional enactments above referred to. As neither the Act of March 3, 1875, nor the Act of March 3, 1899, authorized the Secretary to grant permits for occupation of a forest reserve by a Railway Company which had not complied with the provisions of the Act of March 3, 1875, nor authorized the Secretary to sell timber from the reserves in the manner contemplated by the stipulation, and there is no other act from which such authority could be derived, it follows that the stipulation, when made with such a company as the bill considers appellant, contemplated illegal and prohibited acts; and an agreement to enter into such a stipulation will not be decreed.

The bill, therefore, was insufficient as a bill for the specific enforcement of the alleged agreement.

(b) *There was no consideration for the promise embodied in this writing.*

The answer and proofs establish that the defendant had, in fact, accepted the provisions of the Act of March 3, 1875, and identified itself as a grantee under that act, in February, 1906, more than a year prior to the date of the paper executed by Mr. Peck. As we have shown under Point I, it was vested with full power and authority,

by virtue of such acceptance and identification, to enter upon, and construct and maintain its road through this reserve, and to take for purposes of construction material of earth, stone and timber from the lands adjacent to its line. Being vested with these rights at the time the writing of May 10, 1907, was signed, under the direct grant from Congress, the attempted imposition of terms and conditions by the Interior Department upon its exercise thereof, was a nullity.

State v. *N. P. Ry. Co.* (Minn.), 108 N. W. Rep., 269, 271.

Shortle et al. v. *T. H. & I. R. Co.* (Ind.), 30 N. E. Rep., 1084, 1085.

City of Newton v. *C. R. I. & P. Ry. Co.* (Ia.), 23 N. W. Rep., 905-906.

4 Pomeroy's Eq. Jur. (3rd Ed.), Sec. 1405.

(c) *The alleged agreement of May* 10, 1907, *was never accepted or ratified by the Railway Company.*

The paper writing was, upon its face, a promise and agreement signed by Mr. Peck and purporting to be made by him "on behalf of the company."

The Court of Appeals, in its opinion, says:

> "Peck was the General Counsel of the defendant Railroad Company, and unquestionably authorized, in furtherance of its purpose in acquiring a right of way across the Coeur d'Alene Reserve, to enter into just such an agreement as he did. In implicit reliance upon said agreement, and in full pursuance of its intendment, the plaintiff, acting through its duly authorized officer, granted immediate permission to enter upon the construction of its railroad across the reserve, and this prior to any approval of the surveys and plat of the company's right of way." (Rec., 588.)

This statement ignores the uncontradicted testimony and the express language of the approval endorsed upon the paper writing by the Forester. Mr. Peck testified:

> "I was not the General Counsel for the Idaho

> Company and I did not know until sometime afterwards that I had been put down as General Counsel of the Idaho Company. I did not see it and did not notice it. It was an oversight, an inadvertence, and undoubtedly was written by some of the clerks or people connected with the Forest Service who did not understand the situation. Certainly the title was not written on by myself." (Rec., 371.)

(See, also, testimony of Mr. Field, Rec., 378, 379.)

And that the Forestry Department officers understood that Mr. Peck did not have the authority to bind the company which the opinion of the Court of Appeals attributes to him, is placed beyond question by the language of the approval endorsed upon this writing by the Forester, viz.: "Approved and advance permission given to construct, *subject to ratification hereof by the company.*"

This language made the permission subject to the express condition that the promise of Mr. Peck should be acted upon and ratified by the company itself. This was never done. Upon the contrary, the company, through its officers, as soon as their attention was brought to this paper refused to ratify it, contending that the company's rights, under the Act of 1875, were operative within the reserve without the approval of the Secretary.

Mr. Peck testified:

> "The officers of the Idaho Company I conferred and acted with in respect to the matter of said right of way, were Mr. H. H. Field, General Counsel of that company, and *I think* H. R. Williams, President, both located in Seattle." (Rec., 369.)

Mr. Field testified that he first learned of the execution of this paper writing by Mr. Peck through advices given him by Mr. Peck in Washington in October, 1907. (Rec., 379.)

There is no testimony suggesting that any previous notice thereof had been given to the President, H. R. Williams, or to any other officer of the company, nor is it at

all probable that any such previous notice had been given. Mr. Field, as General Counsel, was primarily in charge of these matters. He was, as shown by Mr. Peck's testimony, the principal official with whom Mr. Peck was communicating; and in the total absence of any evidence to the contrary, it must be assumed that the notice to Mr. Field in October, 1907, was the first notice ever communicated to the company of the existence of this instrument. This presumption is further supported by the action which was taken with respect thereto.

Immediately upon being advised by Mr. Peck, or by the Forestry officials, of the existence of this paper writing, Mr. Field informed Mr. Peck of the difference in the conditions existing with respect to the right of way through the Coeur d'Alene Reserve and those which had existed with respect to the right of way through the Helena Forest, and Mr. Peck and Mr. Field at once advised the Government officials with whom they were negotiating, of the fact that the paper had been signed by Mr. Peck under a misapprehension. (Testimony of Mr. Peck and Mr. Field Rec., 368-384.)

November 15th, 1907, when the Forestry officials delivered the stipulation which they were demanding to appellant, with a request for its execution, the company at once advised the Forest Supervisor, through whom the demand was made, that it "would not sign such stipulation but would await the outcome of certain negotiations which were pending at Washington, D. C., with the officers of the Interior Department and of the Department of Agriculture of the United States." (Rec., 225.)

December 2, 1907, Mr. Peck notified the Forester of the United States Department of Agriculture at Washington, that he was not authorized to make any stipulation with respect to the right of way through the Coeur

d'Alene National Forest, different from that which had been made for the right of way by the Washington corporation through the Yakima National Forest. (Rec., 225.) The Government officials understood this to be, as it was intended, a clear refusal by the Railway Company to ratify the action of Mr. Peck in signing the paper of May 10, 1907. This is made clear by the telegram of December 2, 1907, sent by Mr. Price to Mr. Rutledge, Forest Supervisor of the Coeur d'Alene Forest, and by the memorandum made by Mr. Wells, Law Officer of the Forestry Service. (Rec., 226-229.)

The telegram reads as follows:

> "Chicago, Milwaukee & St. Paul claims right to construct without stipulation and without paying for timber destroyed. While negotiations are pending allow construction to proceed. Friendly suit probable. Letter follows."

The work of construction performed between May 10, 1907 and October, 1907, when the company first received notice of the writing of May 10, 1907, cannot be considered as performed by the company in reliance upon that paper, or as a ratification of Mr. Peck's action. The notice at once given to the officials of the Forestry Department that this paper had been signed under a misapprehension, the refusal of the company to sign the stipulation when presented November 15, 1907, and the express advice given to the Forester at Washington, D. C., on December 2, 1907, that the Railway Company claimed the right to construct its road through this Forest Reserve without stipulation and without paying for timber destroyed, make it clear that the work performed subsequent to the time when the company received notice of the paper writing, was not performed in the exercise of any privileges conferred by that writing, but was performed by it in the assertion of rights which it claimed independently of the writing. No implied ratification

of Mr. Peck's action can, therefore, be based upon the construction of the road by the company in the forest. It was not doing that work by virtue of a permission secured by means of the writing, but under an assertion of rights claimed by virtue of its compliance with the Act of March 3, 1875, and of this fact the United States was directly advised not later than December 2, 1907. In this connection, we may note that the great bulk of the work which it did in the forest was performed subsequent to December 2nd, 1907, when, at the latest, the Government had been advised that the company would not ratify the paper writing of May 10, 1907. (Stipulation, Par. 18, p. 234.)

It thus appears that the agreement embodied in the writing, the specific performance of which is sought, was expressly made by the Government subject to ratification by the company, and that it was not only not ratified by the company, but, on the contrary, was directly and distinctly repudiated. Under these conditions, no decree for its specific performance can properly be made.

(d) *The agreement of May* 10, 1907, *was lacking in mutuality.*

> "It is a general principle that when, from personal incapacity, the nature of the contract, or for any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former."
>
> *Marble Co.* v. *Ripley,* 10 Wall., 339, 359.

And see:

Shubert v. *Woodward* (C. C. A.), 167 Fed. Rep., 47, 55.

Taussig v. *Corbin* (C. C. A.), 142 Fed. Rep., 660, 665-6.

Fed. Oil Co. v. *Western Oil Co.* (C. C. A.), 121 Fed. Rep., 674, 677.

Pullman Palace Car Co. v. *T. & P. R. Co.*, 11 Fed. Rep., 625, 630.

Ross v. *U. P. Ry. Co.*, Fed. Cas. 12080 (pp. 1245, 1248).

Norris v. *Fox et al.*, 45 Fed. Rep., 406, 407.

Wadick v. *Mace* (N. Y.), 83 N. E. Rep., 571, 572.

Deitz v. *Stephanson* (Ore.), 95 Pac. Rep., 803, 807.

Chambers v. *Roseland* (So. D.), 112 N. W. Rep., 148, 149.

Fowler Utilities Co. v. *Gray* (Ind.), 79 N. E. Rep., 897, 898.

Ochs v. *Kramer* (Ky.), 107 S. W. Rep., 260, 263.

Levin v. *Dietz* (N. Y.), 87 N. E. Rep., 454, 455-6.

Greinel v. *O'Connor*, 118 N. Y. S., 1053, 1054.

Riker v. *Comfort*, 124 N. Y. S., 1106, 1107.

Redwine v. *Hudman* (Tex.), 133 S. W. Rep., 426, 429.

Jolliffe v. *Steele* (Cal.), 98 Pac. Rep., 544, 545.

Chadwick v. *Chadwick* (Ala.), 25 So. Rep., 631, 633.

Solomon v. *Wilmington S. Co.* (N. C.), 55 S. E. Rep., 300, 303.

4 Pomeroy's Eq., Sec. 1405 (3rd Ed.).

That the objection of lack of mutuality in the beginning may be removed when the unenforcible provision has ceased to be executory, is undoubted, but this rule finds no application to the facts in the case at bar.

The writing of May 10, 1907, clearly contemplated something more than a bare license to appellant, terminable at will by the Government, to proceed with the construction of its work. There was clearly implied therein that if appellant signed the stipulation, its maps should be approved and all question as to its title to a right of way put at rest. The agreement would not be an ex-

ecuted one on behalf of the Government without such approval of the maps of location and final determination of such rights. But that the Government officials could not be compelled by any direct proceeding to execute such maps, is certain. They had, at the time of the filing of the bill, acquiesced in the construction of the road, but they had taken no action looking to the securing to the Railway Company of any evidence of its title or for the protection of permanent rights, and to this extent, the contract, if it was one, was purely executory. Moreover, even when filing the bill, the Government made no offer to execute the contract upon its part or to do equity by approving the map, even though appellant should execute the stipulation. It demanded equitable relief but made no offer to do equity. The necessity of the Government completing the contract upon its part was recognized in the supplemental decision of the trial court and in the decree which requires the Secretary of the Interior to approve the maps. (Rec., 167-174.) But this provision of the decree recognizes that the contract, so far as the Government is concerned, was still executory at the time of the filing of the bill, that the memorandum of May 10, 1907, was lacking in mutuality and had not been performed, or offered to be performed, by the Government so as to take the case as made by the bill out of the rule requiring mutuality as a condition precedent to the entry of a decree of specific performance. Neither is this requirement embodied in the decree a substitute for the failure of the Government to do, or to offer to do, equity, by the approving, or offering to approve, the maps. Indeed, some doubt must exist as to whether in this portion of the decree requiring the Government to approve the maps, the court has not exceeded the authority vested in the judicial department of the Government. That a court cannot, by direct proceedings, require the Executive De-

partment of the Government to approve a map of location, is unquestioned; and whether it can constitutionally accomplish this result in the indirect manner adopted by the decree in this case, is far from clear.

(e) *The agreement of May* 10, 1907, *was too uncertain for specific performance.*

The agreement was to "execute and abide by stipulations and conditions * * * such stipulations and conditions to be as nearly as practicable like those executed by the company on January 18, 1907, in respect to its railroad within the Helena National Forest." The contract to be executed is not to be a duplicate of the previous contract but to be as nearly like it as practicable. What would be as nearly as practicable is a matter upon which parties may well disagree. The stipulation Exhibit "G," submitted by the complainant and the execution of which it demanded as the principal relief in its bill, may fairly be taken to represent its ideas of what was "as nearly as practicable like" the Helena forest stipulation. The trial court held that such demanded stipulation did not comply with this term of the Peck agreement; and substituted another therefor. (Rec., 165-7.) The respondent is clearly estopped to now contend that the reference to the Helena National Forest stipulation was sufficient to make the proposed agreement clear and certain, or that the minds of the parties met thereon. It is in this dilemma: If it now contends that the provisions of the Peck agreement were clear and certain, it must concede that the stipulation, Exhibit "G," was deliberately framed by it for the purpose of obtaining under compulsion an advantage over appellant to which the Peck agreement gave it no claim, and that its conduct in demanding the execution of that stipulation and seeking to penalize appellant for its refusal to execute the same, was inequitable and unjust, an ad-

mission which must exclude it from a court of chancery, since applicants to such courts must come with clean hands; or, as the only alternative, it must contend that the demanded stipulation Exhibit "G," is "as nearly as practicable like" the Helena stipulation, a contention which involves, in view of the decree, an admission that the Peck agreement was not certain and clear in defining the terms of the stipulation which the Railway Company was to execute. We think it is clear that the minds of the parties never met upon the terms of the stipulation to be executed, and that therefore the Peck agreement is too uncertain for specific performance.

Zimmerman v. *Rhodes et al.* (Pa.), 75 Atl. Rep., 207, 208.

Croft v. *Hanover F. Ins. Co.* (W. Va.), 21 S. E. Rep., 854, 855.

Strang v. *R. P. & C. R. Co.*, 93 Fed. Rep., 71, 75.

Shumway v. *Kitzman* (So. D.), 134 N. W. Rep., 325, 328.

Van Dyke v. *Norfolk S. R. Co.* (Va.), 72 S. E. Rep., 659, 664.

L. N. A. & C. Ry. Co. v. *B-B Stone Co.* (Ind.), 39 N. E. Rep., 703, 707-708.

Solomon v. *Wilmington S. Co.* (N. C.), 55 S. E. Rep., 300, 302.

Morey v. *Terre Haute T. & L. Co.* (Ind.), 93 N. E. Rep., 710, 714-15.

4 Pomeroy's Eq., Sec. 1405 (3rd ed.).

(f) *This agreement, assuming it to be the agreement of the appellant, is an agreement to make an agreement. Courts will not decree the specific performance of such agreements.*

"Nothing is better settled than that equity will not compel the specific performance of an agreement to make an agreement."

Hoskins v. *Ryan* (N. J.), 64 Atl. Rep., 436, 437.

Lane v. *Rector, etc.* (N. J.), 45 Atl. Rep., 702, 703.

Ridgway v. *Wharton,* 6 H. L. Cas., 268.

And see:

Allegheny B. B. Club v. *Bennett,* 14 Fed. Rep., 257.

Geer v. *Clark,* 82 N. Y. Supp., 87.

An agreement to make an agreement is a contradiction in terms. If the minds of the parties have met upon all of the terms and provisions of the proposed contract, then is the contract complete. If they have not so met, a court of equity could not compel the execution of the agreement to make an agreement without making for the parties the agreement to be entered into, and this it will not do.

While it is true that there are exceptions to the rule, such exceptions are not broad enough to cover such an agreement as that here sought to be enforced. The agreement which it was demanded the company should make, and that which the lower courts have by decree commanded appellant to enter into, is one principally for the payment of money at a fixed rate for timber cut and to pay for timber damaged by fire. The enforcement of such an agreement would not be an exception to the rule, but involves an abrogation of the rule, for if the company may be required to execute this agreement it will be very difficult indeed to find any agreement which would not also be an exception to the rule. It does not come within the reasons which have been assigned for sustaining any of the exceptions which have been made. Thus, courts of equity decree the performance of covenants of indemnity "upon the principle on which the court entertains bills *quia timet.*"

Champion v. *Brown,* 6 Johns. Ch., 398, 406.

It may be further noted that suits to enforce contracts

of indemnity do not require the execution and delivery of further executory contracts.

It is not within the principle upon which contracts to execute and deliver mortgages are specifically enforced, for the execution of such contracts is required upon the principle that the creditor, having loaned money where presumptively he would not have accepted the credit of the debtor without the additional security, and having acquired thereby an equitable lien upon the property, the court for his protection and to prevent the defeat of his claims by conveyances to innocent purchasers, will require the formal instrument evidencing the lien to be executed, and the better doctrine is that courts of equity will not decree the specific performance of an agreement to execute a mortgage unless there is some special equity alleged and shown.

Brown v. *E. Van Winkle G. & M. Works* (Ala.), 6 L. R. A. (N. S.), 585, 590.

Agreements to deliver insurance contracts are enforced because "in an action at law the plaintiff would recover only nominal damages for the failure to issue the policy and that proceedings at law if loss has occurred would be more complicated and embarrassing than upon the policy."

36 Cyc., 568, *Note* 69.

(g) *The stipulation which the respondent demanded that appellant execute, and that which the court in its decree has required it to execute, are in excess of the executive authority.*

> "If, in the granting of a location to a projected corporation, the public officers who made the grant had sought to impose restrictions which would seem unlawful, either because they required the performance of a forbidden act, or because they transcend the scope of the authority of the officers, doubtless such restrictions could not be enforced; and the ques-

tion how far the grant of the location would be deemed valid in such a case is not before us. The general doctrine is that the location would be held to be valid, the attempt to impose an unlawful restriction being a mere nullity."

Murphy v. *Worcester, etc., Ry. Co.* (Mass.), 85 N. E. Rep., 507, 509.

See, also:

In re Kings County Elev. Ry. Co. (N. Y.), 13 N. E. Rep., 18, 22-26.

Aberdeen v. *Honey*, 8 Wash., 251, 254.

Keefe v. *L. & B. St. Ry. Co.* (Mass.), 70 N. E. Rep., 37, 38.

People v. *Coler* (N. Y.), 59 N. E. Rep., 715, 718.

City of So. Pasadena v. *L. A. T. Ry. Co.* (Cal.), 41 Pac. Rep., 1093, 1094.

City of Arcata v. *Green* (Calif.), 106 Pac. Rep., 86, 87-8.

Galveston, &c., Ry. Co. v. *City of Galveston* (Texas), 39 S. W. Rep., 96, 100, *et seq.*

City of Kenosha v. *K. H. T. Co.* (Wis.), 135 N. W. Rep., 849.

Assuming for the purposes of this argument that the Act of March 3, 1899, authorized the Secretary of the Interior to make a grant of a right of way for railway purposes by filing and approving surveys and plats thereof across forest reservations "when, in his judgment, the public interests will not be injuriously affected thereby"; and assuming further, as held by the Court of Appeals, that under the provisions of this act and of the Act of June 4, 1897, the Secretary is vested with jurisdiction to prescribe rules and regulations for the purpose of protecting the reservation from injury by railway construction therein, and with jurisdiction to require the corporation seeking such right of way to enter into stipulations or agreements for the purpose of protecting the forest, as a condition precedent to his approval of the surveys

and plats of location, nevertheless, the power thus conferred would not extend beyond such requirements as were reasonably necessary for the protection of the reserve.

The stipulation demanded by the Government and that embodied in the decree of the court, go beyond this. The provisions of Clause 2 of the stipulation, requiring payment for the timber cut for the purpose of clearing the right of way and the additional strips required to be cleared by the Government, have no tendency to protect the forest. They are revenue regulations, pure and simple, devised for the purpose of securing money for the timber cut. This requirement is not only in conflict with the spirit of the Act of March 3, 1875, which grants the privilege of taking material of earth, stone and timber for construction purposes, free, but it is also in direct conflict with the provisions contained in the Act of June 4, 1897, which, as we have heretofore pointed out, authorized the sale of timber within the reservations for limited purposes only, and only under restricted conditions which the stipulation ignores.

The demanded stipulation and the one which the court has ordered the appellant to execute, are, therefore, illegal to the extent that they provide for a sale of the timber by the Government to the Railway Company.

For this reason also the inclusion in the decree of $26,989 for timber cut, is erroneous.

(2) *The case is equally without equity when considered from the standpoint of injunctive relief.*

(a) We have heretofore noted that the bill is not primarily for injunctive relief but for specific performance only, and that the injunctive relief is sought only as a means of enforcing the demand for specific performance; and this being so, if the case fails as one for specific performance, it cannot be sustained as a case for injunction.

(b) Independently, however, of the above, complainant is not entitled to injunctive relief. The bill charges that immediately after May 10, 1907, appellant began the construction of its railway in the reserve; that December 2, 1907, it advised appellee of its contention that it could not be required to sign any stipulation. The bill admits and the evidence establishes that the appellee was at all times advised of the acts of appellant done in its railway construction; that with full knowledge thereof the appellee took no steps until the filing of the bill June 25, 1909. As shown by the telegram of the Forester of December 2, 1907, and the memorandum of the Law Officer of the Forestry Service of the same date (Rec., 226-229), it consented to the construction of the railway waiving expressly all claims for injunctive relief; and maintained that position until the present bill was filed, which was only when the railway was practically completed. That a land owner cannot sit still and see a railway company enter upon his land, proceed with the construction of its railway, doing a large amount of work and expending vast sums of money, and then invoke the aid of a court of equity to enjoin such work, is the uniform holding.

> "It has been frequently held that if a land owner, knowing that a railroad company has entered upon his land and is engaged in constructing its road without having complied with the statute, requiring either payment by agreement or proceedings to condemn, remains inactive and permits them to go on and expend large sums in the work, he will be estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein, and be restricted to a suit for damages."
>
> *Roberts* v. *N. P. R. R.*, 158 U. S., 1, 11.

And see:

1 High on Injunctions (4th ed.), Sec. 618, 643.

Osborne & Co. v. *M. P. Ry. Co.*, 37 Fed. Rep., 830.

Pettibone v. *L. C. & M. R. Co.*, 14 Wis., 440.

I. B. & W. Ry. Co. v. *Allen* (Ind.), 15 N. E. Rep., 446.

1 Elliott on Railroads (2nd Ed.), Sec. 628.

N. P. Ry. Co. v. *Murray* (C. C. A)., 87 Fed. Rep., 648, 651.

N. P. Ry. Co. v. *Smith*, 171 U. S., 260, 271.

Stuart v. *U. P. R. Co.* (C. C. A.), 178 Fed. Rep., 753, 757.

In *Osborne & Co.* v. *M. P. Ry. Co., supra*, the bill of complaint was filed in February, 1887, and the railway track was not laid until March 20, 1887. There was, however, no application for an injunction *pendente lite* and the case was not brought on for final hearing until January 31, 1889, or a little less than two years. The court held that the delay in bringing the action on for hearing without asking an injunction *pendente lite*, was fatal to the injunctive relief sought.

And while it is true that time does not run against the United States so as to bar a cause of action, that equitable estoppel will operate to deprive the Government as well as other litigants of the right to peculiar remedies by a court of conscience, has been repeatedly held.

U. S. v. *San Jacinto Tin Co.*, 23 Fed. Rep., 279, 286-7.

U. S. v. *Flint*, No. 15, 121 Fed. Cas.

U. S. v. *White*, 17 Fed. Rep., 561, 565.

And see:

Mountain Copper Co. v. *U. S.* (C. C. A.), 142 Fed. Rep., 625, 629.

U. S. v. *Grand Rapids, etc., Co.*, 154 Fed. Rep., 131, 136.

C. & D. Canal Co. v. *U. S.* (C. C. A.), 223 Fed. Rep., 926, 929-30.

It is well said by the trial judge in his opinion, "As

a suitor its (the Government's) status is substantially that of a private litigant" (Rec., 166); and being such, it is bound by the ordinary rules governing litigants in courts of equity.

(c) Appellant was in possession of the right of way where its road was being constructed, claiming title thereto under the provisions of the Act of March 3, 1875, with full right to take material of earth, stone and timber from lands adjacent thereto for purposes of construction. It was in such possession under claim of right. The injunctive relief, so far as it related to the improvement, use and continued occupation of the right of way, contemplated the ouster of appellant from this possession, and the purpose of the bill being to secure the ejection of the appellant, it was, to this extent, in excess of the equity jurisdiction.

1 High on Injunctions (4th ed.), Sec. 629-30, 674, 718.

Buchanan Co. v. *Adkins* (C. C. A.), 175 Fed. Rep., 692, 698.

Le Roy v. *Wright*, No. 8, 273 Fed. Cas.

C. M. & P. S. Ry. Co. v. *Farrell*, 20 Ida., 680, 686.

So far as the bill sought to obtain an injunction against the cutting or removing of timber from the right of way upon the theory that appellant was committing waste is concerned, it is sufficient to say that such relief, if granted at all, could only be granted in aid of an action at law to recover possession and for the purpose of maintaining the property *in statu quo* pending the determination as to the legal right of the appellant. No such action having been brought, the respondent is not entitled to injunctive relief upon this ground.

Buchanan Co. v. *Adkins* (C. C. A.), 175 Fed. Rep., 692, 698.

Le Roy v. *Wright*, No. 8, 273 Fed. Cas.

(d) As to the cutting of timber outside of the right of way it will be noted: (1) That the bill contains no allegation that such timber was being cut for purposes other than the construction of the railway; and if appellant was, as it contends, entitled to the benefit of the Act of March 3, 1875, such cutting would be within its legal rights; (2) that the cutting of the extra widths was pursuant to the demands of the respondent. See:

Par. 1 of Exhibit G attached to bill (Rec., 45).
Letter of March 9, 1908 (Rec., 235).
Letter of April 27, 1908 (Rec., 237).
Letter of May 15, 1908 (Rec., 238).
Letter of July 10, 1908 (Rec., 239-41).
Letter of July 23, 1908 (Rec., 242).
Letter of July 11, 1908 (Rec., 243).
Letter of August 6, 1908 (Rec., 244).
Letter of August 13, 1908 (Rec., 245).
Testimony of Mr. Skeels (Rec., 254, 275-276).

That under these circumstances the claim of the Government for an order enjoining such cutting was without equity, goes without saying.

For the foregoing reasons we submit that the bill of the complainant was, and is, totally without equity.

Point VI.

The United States Circuit Court of Appeals erred in refusing to hold the bill multifarious.

The bill, as we have heretofore noted, was filed primarily to secure the specific performance of the promise contained in the Peck agreement of May 10, 1907. There was united in this bill with the claim for specific performance, the three distinct causes of action discussed in Points II, III and IV, viz: (Point II) claim on account of an alleged public nuisance, which was in nowise connected with the claim that the appellant should execute the demanded stipulation, since such stipulation contained no reference to injuries of this nature; (Point

III) a claim for damages pure and simple based upon an alleged tortious burning of timber; and (Point IV) a claim on account of timber cut. The claims asserted for stream obstructions and the burning of timber are based upon alleged torts. Whether the claim for timber cut is to be deemed a claim for damages for an alleged wrongful cutting, that is, a tort, or whether it is to be deemed, as the trial court treated it in determining the cause, as a contract obligation growing out of the alleged promise by Mr. Peck on behalf of the company to execute a stipulation similar to the Helena National Forest stipulation, where there is embodied an agreement to pay $3 per thousand for timber cut, is not clear. These three claims, two based entirely upon torts, the third on either a tort or contract, are united in this bill with the claim for specific performance, which is purely and simply a claim based upon a contract. The bill also, in so far as it asks an award of damages in conjunction with the prayer for specific performance and the alternative prayer for injunctive relief, united claims of purely equitable cognizance with those which are purely legal in their character. This combination of claims sounding in tort with those based upon contracts, of claims of equitable cognizance with those purely legal in character, is not permissible and renders the bill multifarious.

A bill for equitable relief with which is coupled a demand for personal judgment on purely legal claims, is multifarious.

> *Hudson et al.* v. *Wood et al.*, 119 Fed. Rep., 764, 777-8.
>
> 23*rd St. Ry. Co.* v. *M. S. Ry. Co.*, 177 Fed. Rep., 477, 479.

And a bill to recover for two independent disconnected and unrelated matters, is multifarious and cannot be sustained.

> *Norton* v. *Colusa, etc., Co.*, 167 Fed. Rep., 202, 206.

Inman v. *N. Y. I. W. Co.*, 131 Fed. Rep., 997, 999.
Mesisco v. *Giuliana et al.* (Mass.), 76 N. E. Rep., 907.
Leslie v. *Leslie*, 84 Fed. Rep., 70, 71.
Hutchinson v. *Dennis* (Pa.), 66 Atl. Rep., 524, 525.
Cecil v. *Karnes* (W. Va.), 56 S. E. Rep., 885, 886.

It is true the rule prohibiting multifariousness is to some extent a rule of convenience and considerable latitude is exercised in its application. This discretion upon the part of the court, however, is not arbitrary or unlimited. It is a judicial discretion to be exercised in aid of justice. And we know of no case, and we think none can be found, where such a grotesque combination of matters of legal and equitable cognizance, of matters of tort and contract, as is presented by the bill in this case, has ever been permitted. Not only does it violate the rules based upon experience prohibiting misjoinder of divers causes of action, but its tendency is strongly toward the defeat of justice. We are, in fact, upon this appeal presenting to this court at least four separate and distinct cases. The result is such an accumulation of questions to be presented and argued as to absolutely preclude their fair presentation within the time limited by the rules of court for argument and to require the submission of this case upon a brief of such undue length as must discourage full consideration of the numerous matters which, however, materially affect the decree entered herein. It was this cumulation of questions, resulting from the combination of these different cases, which prevented the trial court from considering objections to testimony and led it to dispose of the case largely upon the determination of a single question which, however important, by no means authorized the entry of the decree such as was in fact entered. This same cumu-

lation of matters undoubtedly prevented the Court of Appeals from noting the clear errors involved in the adoption of the agreed price for timber *cut* as the measure of value of mature timber *burned*, and the use of incompetent evidence in measuring the damages for immature timber burned. This misjoinder of these disconnected claims has been and is unjust and unfair to appellant, and to the courts upon whom the burden of disentangling such mixed issues and determining four cases in one, ought not to be imposed.

We respectfully submit that the bill should be ordered dismissed because of this defect.

Point VII.

THE UNITED STATES CIRCUIT COURT OF APPEALS ERRED IN REFUSING TO HOLD THAT THE DISTRICT COURT WAS WITHOUT JURISDICTION TO AWARD TO APPELLEE ANY MONEY DAMAGES WHATSOEVER.

In connection with Points II, III and IV we have given reasons why the different items of money damage, aggregating $68,489, were erroneously allowed in the decree in this case. We have shown that the claim for stream obstructions has no proper place in this action, and that the claims for timber cut and for timber burned are alike claims of purely legal cognizance which cannot be litigated in a court of chancery.

U. S. v. *Bitter Root Dev. Co.* (C. C. A.), 133 Fed. Rep., 274.

U. S. v. *Bitter Root Dev. Co.*, 200 U. S., 451.

The appellee in the trial court and Court of Appeals, without questioning the legal nature of the claims for damages for timber destroyed, contended that the court of chancery having taken jurisdiction for any purpose would, to avoid multiplicity of actions, retain jurisdiction for all purposes, including the awarding of relief

purely legal in its nature and which, under other circumstances, the chancery court could not grant; the contention was sustained in those courts which have awarded damages for such claims aggregating $68,489. The rule thus contended for is not an accurate statement of the law, especially when applied to courts of the United States and other courts wherein the distinction between actions at law and actions in equity are rigidly maintained. The rule permitting courts of chancery to award money damages is confined to those cases where such damages are incidental to the principal equitable relief and where the complainant has made out a right to such equitable relief, but is prevented from securing same by some fact for which it is not responsible. While some confusion as to the limits of the rule has arisen from decisions of courts in states where by statute the distinction between actions at law and actions in equity has been, as far as possible, abolished, and where in consequence the courts of equity exercise greater latitude, the limitation of the rule above suggested has been too frequently announced by the federal courts and by courts in states where the distinction between legal and equitable procedures obtain, to admit of doubt as to its existence and soundness.

> "It is not true, by any means, that when a court of conscience has acquired cognizance for one purpose, it thereby acquires cognizance over the entire controversy, for all purposes."
>
> *Loder* v. *McGovern* (N. J.), 22 Atl. Rep., 199, 200.
>
> *Norton et al.* v. *Colusa, etc., Co.*, 167 Fed. Rep., 202, 203, *et seq.*, and cases cited.

Article 7 of the Amendments to the Federal Constitution provides:

> "In suits at common law where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no fact tried by the jury shall

be otherwise re-examined in any court of the United States than according to the rules of the common law."

Section 2 of Article 3 of the Federal Constitution provides:

"The judicial power shall extend to all cases in law and equity, arising under this constitution," etc.

Section 723 of the United States Revised Statutes (in force when this action was instituted and tried) provided:

"Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law."

Construing these constitutional and statutory provisions this court has repeatedly held that the right to trial by jury means the right to a jury trial as the same existed at common law; that the equitable jurisdiction vested in the federal courts is the jurisdiction exercised by the English Chancery Courts at the time of the adoption of the constitution; and that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.

Scott v. *Neely*, 140 U. S., 106, 110.
Root v. *Ry. Co.*, 105 U. S., 189, 212, *et seq.*
Hipp et al. v. *Babin et al.*, 19 How., 271, 278.
Buzard v. *Houston*, 119 U. S., 347, 351.
Thompson v. *R. R. Co.*, 6 Wall., 134, 137.

See also:

Amer. Waterworks, etc., Co. v. *Home Water Co.*, 115 Fed. Rep., 171, 181.
Oconto City Waterworks Co. v. *City* (Wis.), 80 N. W. Rep., 1113, 1117.
Smith v. *Bourbon Co.*, 127 U. S., 105, 112.

Stating the rule with reference to the recovery of damages in an action in equity your Honors said:

> "The rule is that where a cause of action cognizable at law is entertained in equity on the ground of some equitable relief sought by the bill, which it turns out cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill without prejudice."
>
> *Dowell* v. *Mitchell,* 105 U. S., 430, 432.

See also:

Buzard v. *Houston,* 119 U. S., 347, 351.

Kramer v. *Cohen,* 119 U. S., 355.

Kessler v. *Ensley Co.,* 123 Fed. Rep., 546, 567.

Alger v. *Anderson,* 92 Fed. Rep., 696, and cases cited.

Lewis Pub. Co. v. *Wyman,* 168 Fed. Rep., 756, 761-2, and cases cited.

S. C. (C. C. A.), 182 Fed. Rep., 13; 228 U. S., 610.

Munday v. *Shellabarger* (C. C. A.), 161 Fed. Rep., 503.

Clark v. *West,* 122 N. Y. Sup., 380, 390, affirmed, 95 N. E. Rep., 1126.

Patterson v. *Patterson* (Ill.), 95 N. E. Rep., 1051, 1063.

Davis v. *City of Silverton* (Ore.), 82 Pac. Rep., 16, 19.

Applying these principles to the case at bar, it is evident that the claims for strictly legal relief by way of damages for the timber cut or burned are not within the jurisdiction of the court, save as they may be incidental to matters of strictly equitable cognizance which had been pleaded and made out in the case. The equitable jurisdiction in this cause was invoked primarily for the specific performance of an alleged contract. We have shown that the claim to equitable jurisdiction upon this ground is unfounded and insufficient to support a de-

cree thereon. The only other ground of application to the court of chancery was for injunctive relief and this also, as shown, has failed. This being so, the court could not retain the bill for the purpose of assessing monetary damages for timber destroyed, but should have dismissed the case.

Point VIII.

THE UNITED STATES CIRCUIT COURT OF APPEALS ERRED IN FAILING TO HOLD THAT THE DECREE ENTERED HEREIN WITH RESPECT TO THE APPROVAL OF THE MAPS OF LOCATION WAS INCONSISTENT WITH ANY RIGHT OF RECOVERY BY APPELLEE FOR TIMBER CUT FROM THE RIGHT OF WAY SUBSEQUENT TO MAY 10, 1907.

The decree entered by the trial court and affirmed by the Court of Appeals, provides:

> "That within thirty (30) days from the date hereof the defendant shall deliver into this court the duplicate maps of its definite location through the Coeur d'Alene Forest Reserve, * * * heretofore filed in said Coeur d'Alene United States Land Office May 10, 1907, or a duplicate thereof; and shall also within said time execute and deliver into court the following stipulation: * * *
>
> Such stipulation to be delivered to the plaintiff by the court upon the approval by the Secretary of the Interior of said maps, *such approval to relate back to May* 10, 1907." (Rec., 169, 174.)

The stipulation embodied in this decree contains the following provision:

> "This stipulation shall be deemed to have been executed on May 10, 1907, *and shall have the same force and effect, so far as practicable, as if it had been executed on the said date.*" (Rec., 173.)

The stipulation and approval of the maps are thus, by the express terms of the decree, to relate back to, and take effect as of, May 10, 1907. And whatever rights the Railway Company can acquire by the filing and approval

of these documents, it must be deemed to have held since that date. That these rights include a right of way 200 feet in width, under the Acts of March 3, 1875, and March 3, 1899, is clear. The stipulation required by the decree opens with the following recital:

> "Whereas, a part of the railroad right of way of the Chicago, Milwaukee & St. Paul Railway Company of Idaho (hereinafter designated as 'the Company'), as shown by a certain map of location filed by the Company in the Department of the Interior on May 10, 1907, under the Acts of March 5, 1875, and March 3, 1899 (said right of way being two hundred (200) feet in width), is located within the Coeur d'Alene National Forest * * *."

That the right of way granted by the Act of March 3, 1875, is more than a mere easement, is settled. Speaking of this right of way, this court recently held:

> "The right of way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event that the Company ceases to use or retain the land for purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee."
>
> *Rio Grande Ry.* v. *Stringham*, 239 U. S., 44, 47.

We have seen that the Act of March 3, 1899, if it makes any grant, does so solely by reference to the Act of March 3, 1875, and even if the grant is limited, as was suggested by the trial court, "to what may be strictly called the right of way features of the Act of 1875," it still included the two hundred feet right of way, with all that a right of way under the Act of 1875 implied. *The timber standing on, and constituting a part of, the right of way, necessarily passed by the grant. And as, by the express provisions of the decree, the title to this right of way is to take effect as of May* 10, 1907, *every piece of timber cut by appellant thereon, subsequent to that date, was its own property. And it is a conceded fact that*

all of the timber cut upon the right of way was cut after that date.

It will undoubtedly be insisted that, by the terms of the stipulation, the right to the grant was conditioned upon payment for the timber, or, in other words, that the soil as distinguished from the timber was granted, but, upon condition that appellant purchase and pay for the timber thereon; but this is in direct conflict with the provisions of the acts granting the right of way.

Neither is there any law anywhere to be found, vesting the department with authority to make such a bargain. We have seen that the forest reserve laws expressly prohibit a sale of timber in such manner. The Act of March 3, 1899, even if it authorizes the Secretary to prescribe rules and regulations for the protection of the forest as a condition precedent to approving maps of the right of way, does not authorize, or purport to authorize, that official to sell timber or to require payment therefor as a condition precedent to his approval. It does not authorize the Executive to limit the grant of right of way by excluding the timber therefrom any more than it authorizes him to limit it by excluding a portion of the width, restricting it to fifty or one hundred feet. Such a limitation, indeed, would be more reasonable, for a railway might be constructed on a fifty or one hundred feet right of way, but it cannot be constructed without clearing the right of way in part, at least, and removing the timber therefrom.

There is thus no authority in the Executive to make this limited and restricted grant. The only grants which the Executive can make operative by approval, are those authorized by Congress. And there is no more power in that Department to authorize or approve a grant of less than Congress has prescribed, than of more than is authorized. This provision of the decree and of the stipula-

tion ignores the limited powers of the Secretary; and assumes a power in that officer of disposal of public lands, which is without warrant in law.

We submit, therefore, that even if the law is as announced in the opinion of the trial court, or of the Court of Appeals, the decree entered cannot stand, for it is inconsistent therewith, and in its own provisions.

Conclusion.

If appellant was entitled to the benefits of the Act of March 3, 1875, this suit must be dismissed. There would exist no consideration whatsoever to support the Peck agreement, and even if otherwise unobjectionable, it would remain a mere *nudum pactum*. And if no right of way were secured under that act, but one is authorized and secured by the approval of the map as required by the decree, and under the Act of 1899, the obligation to pay for the timber thereon is, for reasons pointed out, void as being in excess of the power of the Executive to demand or accept; and the stipulation is, to that extent, a nullity, and one which a court of equity should not require to be executed. If, on the other hand, neither the Act of 1875 nor of 1899 grants or authorizes a right of way in the reserve, appellant was, and is, a trespasser; and there was no authority to sanction its presence therein, or to permit the construction of its road, and the Peck agreement and the stipulation are alike illegal. The case for specific performance, therefore, fails in any event. It equally fails as an action for an injunction against cutting timber on the right of way, whether appellant is the owner of the right of way, under the Act of 1875, or under the Act of 1899, or the decree of the court. It further fails as an injunction suit, because all of the timber, whether on or off the right of way, was cut with the knowledge and acquiescence of the Government, that cut

off of the right of way being cut under the direct demands of the Government, and for its benefit; and all cutting having been completed before the action was commenced. The equitable causes of action being without merit, there remained no jurisdiction in the court to hear, determine, or enter judgment on, the legal claims.

We respectfully submit that the decree entered herein should be set aside, and the cause remanded with directions to enter a decree dismissing this suit.

H. H. FIELD,
F. M. DUDLEY,
Solicitors for Appellant.

F. M. DUDLEY,
Counsel.